No. 78-1261

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN A. CARLSON, DIRECTOR
FEDERAL BUREAU OF PRISONS, ET AL., PETITIONERS

v.

MARIE GREEN, ADMINISTRATRIX OF THE
ESTATE OF JOSEPH JONES, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

CITATIONS

Cases:

Cases—Continued: Page

Constitution:

United States Constitution:

Statutes: Page

Miscellaneous: Page

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The Solicitor General, on behalf of Norman A. Carlson, Director, Federal Bureau of Prisons, and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

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[1] The other federal defendants include the Assistant Surgeon General, the Chief Medical Officer of the Terre Haute Penitentiary and two staff officials at the Terre Haute Penitentiary infirmary. The warden of the Penitentiary also was named in the original complaint but was never served, and he is not a party to this case (App. A, *infra*, 16a n.12).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-17a) is reported at 581 F.2d 669. The opinion of the district court (App. D, *infra*, 22a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 18a-19a) was entered on August 3, 1978. A timely petition for rehearing was denied on November 24, 1978 (App. C, *infra*, 20a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in circumstances in which the Federal Tort Claims Act provides an adequate federal remedy, an alternative remedy should be found to be implied under the Eighth Amendment.

2. Whether, if the Eighth Amendment creates such a right, survival of that action is governed by federal common law rather than the state statutes that apply to analogous cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Eighth Amendment to the United States Constitution provides in relevant part:

> [C]ruel and unusual punishments [shall not be] inflicted.

3. 28 U.S.C. 1346(b) provides in relevant part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

4. 28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

5. 28 U.S.C. 2680(h) provides:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> * * * * *
>
> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

Joseph Jones, Jr., died in the federal penitentiary in Terre Haute, Indiana, while serving 10 years' imprisonment for bank robbery. Alleging that her son's death was the result of deliberate indifference to his medical needs in violation of the Fifth and Eighth Amendments to the Constitution, respondent, as administratrix of her son's estate and next-of-kin, brought this suit seeking money damages.

1. Respondent's complaint alleges the following facts.[2] On his entry into the federal prison system in 1972, Jones was diagnosed as a chronic asthmatic. Jones arrived at Terre Haute in July 1974. Between July 30 and August 6, 1975, he was hospitalized outside the prison for his asthmatic condition. The attending physician recommended that Jones be transferred to a prison in a better climate and also prescribed certain medication for Jones. Jones remained in Terre Haute and did not receive the medication that had been prescribed.

On August 15, 1975, Jones complained of another asthma attack and was admitted to the prison hospital.[3] Jones remained there for eight hours, sporadically attended by petitioner William Walters, an unlicensed nurse in charge of the infirmary. Despite Jones's steadily worsening condition, no doctor examined him because none was on duty and none was called in.[4] After tending to his other duties, Walters eventually attempted to treat Jones with a respirator that Walters had been told was not functioning properly. When Jones pulled away from the machine and complained that his breathing was worse, Wal-

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[2] In the current procedural posture of the case, we accept as true the factual allegations of the complaint, which are summarized by the court of appeals (App. A, *infra*, 2a-4a).

[3] The complaint states that this attack occurred on August 14, 1975.

[4] The complaint alleges that petitioner Benjamin De Garcia, the chief medical officer of the prison, had failed to make any provisions for emergency medical service.

ters gave Jones two injections of Thorazine, a drug that should not be used for treatment of asthma. About thirty minutes after the second injection, Jones suffered a respiratory arrest. Walters and petitioner Emmett Barry then attempted to revive Jones by administering an electric jolt to him, but neither Walters nor Barry knew how to operate the emergency machine. Jones later was taken to the local hospital and pronounced dead on arrival.

2. On June 18, 1976, respondent filed this suit in the United States District Court for the Southern District of Indiana, claiming that the acts summarized above caused the death of her son and constituted gross and intentional medical maltreatment in violation of the Fifth and Eighth Amendments. Respondent alleged that jurisdiction existed under 28 U.S.C. 1331 and sought $1,500,000 compensatory and $500,000 punitive damages.

In January 1977 the district court dismissed the action on jurisdictional grounds.[5] The court first concluded that a damages action for constitutional violations is available under the rationale of this Court's decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and that respondent had alleged sufficiently a violation of her son's Eighth Amendment rights (App. D, *infra*, 25a-26a). See *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The court held, however, that because under Indiana law respondent's

[5] The court also found that three of the six federal defendants have been improperly served and therefore dismissed the action against them on this alternative ground (App. D, *infra*, 23a-24a).

recovery was limited to "reasonable hospital, medical, and burial expenses, * * * it is apparent that [respondent] cannot 'in good faith' satisfy the [$10,000] jurisdictional amount requirement" of 28 U.S.C. 1331 (App. D, *infra*, 27a).[6]

The court of appeals reversed in substantial part.[7] The court agreed with the district judge that respondent had alleged sufficiently a *Bivens*-type right of recovery arising under the Eighth Amendment. The court refused, however, to apply the Indiana survival and wrongful death provisions to this case. The court concluded that "whenever the relevant state survival statute would abate a *Bivens*-type action brought

[6] The Indiana Civil Code provides that "[a]ll causes of action shall survive * * * except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein." Ind. Code ¶ 34-1-1-1 (1971). Where the injured person "dies from causes other than said personal injuries so received," then the deceased's representative may recover "only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death." *Ibid.* But if the injury causes the death of the injured party, the decedent's representative usually may recover unlimited damages (*i.e.*, including pain and suffering and lifetime earnings), except where, as here, the decedent leaves no spouse, dependent children or dependent kin. Ind. Code ¶ 34-1-1-2 (1971). In the latter circumstance, the representative may recover only medical, hospital, burial and administration expenses. *Ibid.* Jones had no wife, children or dependent kin, and his medical, hospital, and funeral expenses were paid by the federal government.

[7] The court of appeals affirmed the dismissal of this action with regard to one of the federal defendants whom respondent failed to serve at all. See note 1, *supra*.

against defendants whose conduct results in death, the federal common law allows survival of the action" (App. A, *infra*, 13a). The court recognized that the Indiana rule would not thwart any interest of Jones, but it concluded that the rule would "subvert" the "policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure" (*id.* at 12a).

REASONS FOR GRANTING THE PETITION

1. This case presents important questions concerning the scope and application of the principles announced in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The court of appeals has held that the Eighth Amendment gives respondent a right to seek money damages from federal officials, even though no statute creates such a right of action and even though the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671 *et seq.*, provides an adequate federal remedy for respondent's claims on behalf of her son's estate. The court's implication of a *Bivens*-type constitutional right of action to supplement or replace a comprehensive statutory remedy not only ignores the analysis used by this Court in *Bivens* and subsequent cases but also squarely conflicts with several decisions of the lower federal courts. In light of these conflicts, and because this Court is considering a closely related issue in *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), cert. granted, No. 78-5072 (Oct. 30, 1978), the Court should grant review here.

a. In *Bivens* the Court established that the victims of a violation of the Fourth Amendment by a federal agent has a right to recover damages in federal court despite the absence of any statute conferring such a right. Consistent with its approach in other "implied right of action" cases,[8] the Court examined the nature of the substantive right in question, the scope of federal remedies available, whether the substantive right was appropriately adjudicated in federal court, and whether there were "special factors counselling hesitation in the absence of affirmative action by Congress" (403 U.S. at 396). The Court concluded that the substantive right in question was preeminently federal in nature, that the availability of damages would encourage obedience to the constitutional norm, and that Congress had not indicated in any way that a damages remedy would be inappropriate.[9] The

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[8] See, *e.g.*, *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). The standards under which the Court should recognize rights of action in the absence of explicit statutory authorization are extensively discussed in three briefs that the government has filed in cases now before the Court. See *Chrysler Corp.* v. *Brown*, No. 77-922, argued (Nov. 8, 1978); *Cannon* v. *University of Chicago*, No. 77-926, argued (Jan. 9, 1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645, cert. granted (Nov. 6, 1978). We have furnished copies of our briefs in these cases to counsel for respondent.

[9] Another relevant inquiry may be whether "courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for [the particular constitutional violation]." *Bivens*, *supra*, 403 U.S. at 409 (Harlan, J., concurring). See *Carey* v. *Piphus*, 435 U.S. 247 (1978).

Court remarked, however, that the existence of "another [federal] remedy, equally effective in the view of Congress," *id.* at 397, might well be a "special factor[]" militating against the implication of a constitutional damages action. Justice Harlan, who concurred in the judgment, also remarked that "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability," until such time as the sovereign waives its immunity "[f]or people in Bivens' shoes, it is damages or nothing" (*id.* at 410).

The Court thus recognized that the implication of a constitutional damages action might well be inappropriate where Congress has provided another adequate remedy. Consistent with this recognition, the Court later held that the existence of a statutory remedy for government employees in employment discrimination cases precluded resort not only to other possible statutory remedies but also to a *Bivens*-type action under 28 U.S.C. 1331. *Brown* v. *General Services Administration*, 425 U.S. 820, 823-824, 834-835 (1976) (construing Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16). It is therefore of considerable importance, in deciding whether to recognize federal rights of action for "constitutional torts," to analyze all of the statutes that either supply a remedy or indicate what the remedy should be.

Several courts of appeals, following the analysis set forth in *Bivens* and *Brown*, have refused to find a remedy implied directly from the Constitution for use

by plaintiffs whose injuries could be redressed under existing federal statutes. *Turpin* v. *Mailet*, No. 77-7345 (2d Cir. Jan. 16, 1979) (*en banc*) (rejecting extension of *Bivens* following remand by this Court to reconsider prior decision in light of *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978)); *Molina* v. *Richardson*, 578 F.2d 846, 850-853 (9th Cir. 1978) (*Bivens* not applicable in light of existing remedy under 42 U.S.C. 1983); *Richardson* v. *Wiley*, 569 F.2d 140 (D.C. Cir. 1977) (Title VII precludes *Bivens*-type remedy); *Mahone* v. *Waddle*, 564 F.2d 1018, 1024-1025 (3d Cir. 1977) (existence of 42 U.S.C. 1981 militates against extension of *Bivens*). And two federal district courts have rejected the result the Seventh Circuit reached here. These courts hold that prisoners who could seek relief under the FTCA may not seek damages directly from federal officials under an implied constitutional right of action. See *Torres* v. *Taylor*, 456 F. Supp. 951 (S.D. N.Y. 1978); *Hernandez* v. *Lattimore*, 454 F. Supp. 763 (S.D. N.Y. 1978), appeal pending, No. 78-2098 (2d Cir.). Contra, *Loe* v. *Armistead*, 582 F.2d 1291 (4th Cir. 1978).[10] Because the FTCA provides an adequate remedy for prisoners who are harmed by improper medical care,[11] the instant decision conflicts with these cases.

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[10] A petition for a writ of certiorari is also being filed on behalf of the federal defendants in this case. We have furnished a copy of the petition in *Loe* to counsel for respondent.

[11] The FTCA has long been construed to cover prisoners' allegations of improper medical care. See, *e.g.*, *United States*

The FTCA establishes comprehensive administrative and judicial remedies for injuries suffered as the result of the unlawful acts or omissions of federal officials. An injured person must pursue administrative remedies in the first instance and seek judicial relief, against the United States, only if administrative relief is not forthcoming. The Seventh Circuit's creation of a remedy based directly on the Eighth Amendment would allow injured persons to bypass the administrative remedies requirement (and statute of limitations)[12] imposed by the FTCA. See 28 U.S.C. 2675(a), 2401(b). This might create litigation that is needless, because the administrative process could have afforded full relief. In addition, the Seventh Circuit's holding would frustrate the congressional decision to remunerate the victims of at least some official misconduct out of the public fisc rather than out of the pockets of the individual officials.[13] In sum,

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v. *Muniz*, 374 U.S. 150, 151-152 (1963); *Brown* v. *United States*, 374 F. Supp. 723 (E.D. Ark. 1974). Moreover, since 1974 the FTCA also has provided recovery for many of the intentional torts of "investigative or law enforcement officers." See 28 U.S.C. 2680(h); S. Rep. No. 93-588, 93d Cong., 1st Sess. (1973). Correctional officers and other employees of the Bureau of Prisons fall within the definition of "investigative or law enforcement officers." See *Torres* v. *Taylor*, *supra*, 456 F. Supp. at 953-954; 18 U.S.C. 3050.

[12] See *Kubrick* v. *United States*, 581 F.2d 1092 (3d Cir. 1978), petition for cert. pending, No. 78-1014.

[13] Although it furnishes legal defense, the federal government does not indemnify its employees against personal judgments such as those resulting from the *Bivens*-type actions at issue here. See *Hernandez* v. *Lattimore*, *supra*, 454 F. Supp. at 765.

[Footnote continued on page 13]

extension of the *Bivens* rationale to claims covered by the FTCA would "allow [Congress's] careful and thorough remedial scheme to be circumvented by artful pleading." *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833.

b. A related question involving the application and scope of *Bivens* is before this Court in *Davis* v. *Passman*, *supra*. That case involves a *Bivens*-type suit for damages arising out of alleged gender-based employment discrimination by a then member of Congress. The Fifth Circuit held that, in light of the

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[13] [Continued]

With regard to certain kinds of claims, the FTCA explicitly prohibits the award of damages against federal officials if the United States intervenes as a defendant. 28 U.S.C. 2679(b). Another provision states that a judgment in any FTCA action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," 28 U.S.C. 2676. These provisions, insofar as they indicate a legislative design under which the liability of the United States is exclusive, strongly militate against the implication of an additional federal remedy. It might be argued in response that this exclusivity pertains only to cases in which the United States is a defendant, thus leaving to plaintiffs the option of proceeding against the individual employees. On this reading, the limits to the rule of exclusive liability support the Seventh Circuit's decision here. That reading is incorrect, however. The exclusivity rules of the FTCA preclude awards of damages based on state law or explicit federal statutes. Recourse to such well-established remedies is properly extinguished only by clear legislative command. The question here, however, is whether the court should create a right of action that is not founded on state law or any federal statute. The limits on the rule of exclusivity contained in the FTCA do not assist respondent in this respect. Rather, as we emphasize in the text, because Congress has created one remedy the courts should not create another, redundant one.

nature of the rights created by the Due Process Clause of the Fifth Amendment and the limits on the statutory remedies for employment discrimination, an implied constitutional right of action for damages would be inappropriate in that case. 571 F.2d at 798-800. *Davis* v. *Passman* does not present the question which this case involves: whether an existing adequate federal remedy was intended by Congress to be exclusive or otherwise should preclude judicial creation of a constitutional right of action for money damages. Nonetheless, because *Davis* v. *Passman* may address whether it is appropriate to extend implied constitutional remedies to situations in which Congress may have indicated that there be no federal damages remedy, and because that question is closely related to the issue raised by this case, the Court may wish to defer disposition of this petition pending its decision in *Davis* v. *Passman*.

2. The court of appeals also concluded that the Indiana survival and wrongful death provisions are inapplicable to this case. Although Indiana law provides that almost all rights of action survive the victim's death, and in most cases Indiana law would afford substantial recovery for personal injuries causing death,[14] the court nonetheless concluded that the

[14] Indiana limits (but does not abate) recovery for wrongful death only where, as here, the decedent is not survived by any close relatives. See note 6, *supra*. In that regard, the Indiana statute is more generous than the Louisiana provisions approved by this Court in *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), as governing survival of civil rights actions. In declining to create a general federal rule, the Court noted that "[t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." *Id.* at 592.

Indiana statutes "would frustrate the federal policies underlying *Bivens*" in this case because respondent's recovery would be limited to hospital, medical, funeral, and estate administration expenses (App. A, *infra*, 9a). See note 6, *supra*. Therefore, the court, eschewing a case-by-case approach, fashioned a broad federal rule: "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action" (App. A, *infra*, 13a). In so holding, the Seventh Circuit answered a question that this Court reserved in *Robertson* v. *Wegmann*, 436 U.S. 584, 592, 594 (1978).

Rights of action based on violations of the Constitution serve two purposes: compensation of the victims and deterrence of future wrongdoing. As the court of appeals acknowledged (App. A, *infra*, 10a), recovery of damages by respondent will do nothing to "compensate" Jones, who is dead. See *Robertson* v. *Wegmann*, *supra*, 436 U.S. at 592. The recovery would simply be a windfall to respondent, who was not dependent on Jones in any way. Cf. *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703 (1974) (windfall recoveries are disfavored). Moreover, application of the Indiana rule of survivorship would not erode the deterrent force of damages actions. As we have pointed out (note 6, *supra*), the

Indiana rule allows full recovery in almost every case after the victim's death. It limits recovery (and never precludes recovery) only when the victim has no wife, dependent children, or dependent relatives. It limits recovery, in other words, only in those cases where recovery is most likely to be a windfall. The application of this limit leaves the deterrence of damages actions unaffected; it is most unlikely that any of the federal officials who are defendants here acted improperly in the hope that Jones had no dependents and thus would not be able to recover.[15] The incremental deterrence that might be achieved by allowing recovery in cases such as this, even at the expense of the policy against windfalls, is not sufficient to justify the creation of a federal rule to supplant Indiana's rule.

Here, as in *Robertson*, the state rule cannot be considered inconsistent with federal objectives "merely because the statute causes the plaintiff to lose the litigation. If success * * * were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But [42 U.S.C.] § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby"

[15] See *Robertson* v. *Wegmann, supra,* 436 U.S. at 592. Cf. *United States* v. *Janis,* 428 U.S. 433 (1976).

(436 U.S. at 593).[16] The Seventh Circuit has made the choice of law turn solely on "who is advantaged thereby," and this Court should review that decision.

[16] Although *Robertson* involved the construction of 42 U.S.C. 1988, which made state law controlling in some procedural matters in suits under 42 U.S.C. 1983 unless the state law frustrated federal policy, the same principles should apply in this case. Section 1983 simply authorizes federal courts to enforce provisions of the Constitution. If it is ordinarily appropriate to refer to state law in Section 1983 cases on matters such as statutes of limitations, survivorship, and so on, then it is equally appropriate to refer to state law in constitutional suits against federal officers, at least so long as no federal statute calls for a different result. This Court has emphasized the equivalence of *Bivens*-type actions and suits under Section 1983 (see *Butz* v. *Economou*, No. 76-709 (June 29, 1978)), and many federal courts have held that state law rules on limitations and similar matters should be used in *Bivens* actions. See, *e.g., Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977); *Regan* v. *Sullivan*, 557 F.2d 300, 303-307 (2d Cir. 1977); *D[illegible] Malherbe* v. *International Union of Elevator Constructors*, [illegible] F. Supp. 1335 (N.D. Cal. 1978).

CONCLUSION

The Court should defer disposition of this petition until it has decided *Davis* v. *Passman*. If it elects not to defer disposition, it should grant the petition.

Respectfully submitted.

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FEBRUARY 1979

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-1334

MRS. MARIE GREEN, Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), and next-of-kin of Joseph Jones, Jr., PLAINTIFF-APPELLANT

v.

NORMAN A. CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana
Terre Haute Division

No. TH 76-93-C—JAMES E. NOLAND, *Judge*

Argued November 3, 1977—Decided August 3, 1978

Before FAIRCHILD, *Chief Judge*, and SWYGERT, *Circuit Judge*, and GRANT, *Senior District Judge*.[1]

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[1] The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana, sitting by designation.

SWYGERT, *Circuit Judge.* The principal issue presented on appeal is whether a claim against federal officials for damages based on alleged constitutional violations resulting in death survives for the benefit of the decedent's estate. In dismissing the complaint for lack of subject matter jurisdiction, the district court held that survival of this federal claim is governed by the Indiana survival statute. We do not agree and therefore reverse.

I

To place the issue in context, it is necessary to recite the facts as alleged in the complaint.[2] At the time of his death on August 15, 1975, Joseph Jones, Jr. was a prisoner in the federal penitentiary at Terre Haute, Indiana, serving a ten-year sentence for bank robbery. He had been diagnosed as a chronic asthmatic in 1972 when he entered the federal prison system. In July 1975, the prisoner's asthmatic condition required hospitalization for eight days at St. Anthony's Hospital in Terre Haute. Despite the recommendation of the treating physician at St. Anthony's that he be transferred to a penitentiary in a more favorable climate, Jones was returned to the Terre Haute prison. There he was not given proper medication and did not receive the steroid treatments ordered by the physician at St. Anthony's.

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[2] Because this is an appeal from the dismissal of the complaint, the allegations must be taken as true.

On August 15 Jones was admitted to the prison hospital with an asthmatic attack. Although he was in serious condition for some eight hours, no doctor saw him because none was on duty and none was called in. It was further alleged that defendant Dr. Benjamin De Garcia, the chief medical officer directly responsible for the prison medical services, did not provide any emergency procedure for those times when a physician was not present. As time went on Jones became more agitated and his breathing became more difficult. Although Jones' condition was serious, defendant Medical Training Assistant William Walters, a non-licensed nurse then in charge of the hospital, deserted Jones for a time to dispense medication elsewhere in the hospital. On his return to Jones, Walters brought a respirator and attempted to use it despite the fact that Walters had been notified two weeks earlier that the respirator was broken. After Jones pulled away from the respirator and told Walters that the machine was making his breathing worse, Walters administered two injections of Thorazine, a drug contraindicated for one suffering an asthmatic attack. A half-hour after the second injection Jones suffered a respiratory arrest. Walters and Staff Officer Emmett Barry brought emergency equipment to administer an electric jolt to Jones, but neither man knew how to operate the machine. Jones was then removed to St. Francis Hospital in Terre Haute; upon arrival he was pronounced dead.

The plaintiff, Marie Green, filed this action as administratrix of the estate of her deceased son. Her complaint alleged that he died as the result of medical care so inappropriate as to evidence intentional maltreatment, and that the defendants' acts violated the Due Process Clause and the equal protection component of the Fifth Amendment in addition to the Eighth Amendment's prohibition against cruel and unusual punishment. Several officials and employees of the Federal Bureau of Prisons as well as the Joint Commission of Accreditation of Hospitals were named as defendants. Jurisdiction was invoked pursuant to 28 U.S.C. § 1331. Plaintiff asked for $1,500,000 in actual damages and $500,000 in punitive damages.

Pursuant to motions filed by the defendants the district court dismissed the complaint for lack of subject matter jurisdiction. The court held that the plaintiff could not satisfy the $10,000 jurisdictional requirement of 28 U.S.C. § 1331 because of the limitations on recoverable damages under the Indiana wrongful death and survival statutes.[3]

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[3] In dismissing the complaint, the trial judge concluded that the Indiana wrongful death and survival statutes were the "sole mechanisms" by which Mrs. Jones as the personal representative of her son's estate could maintain an action for damages. The judge reasoned:

> The plaintiff obviously is attempting to avoid the limitations on recovery inherent in the statutory remedy and characterizes this as an action "of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages." The Court does not believe that such an action exists other than as set out in the wrongful death and survival statutes.
>
> * * * *
>
> At common law the plaintiff herein could not have maintained an action such as this on behalf of the decedent's estate since such actions did not generally survive the injured person's death. It is apparent the plaintiff seeks the benefit of the wrongful death statute to provide her with standing to bring this action on behalf of Jones' estate.

The trial court recognized that an action for damages may be brought for a violation of a right guaranteed by the Constitution. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The court further recognized that under the authority of *Estelle* v. *Gamble*, 429 U.S. 9 (1976), Jones could have maintained this *Bivens*-type action against the defendants if he had survived the alleged wrongs. The court, however, dismissed plaintiff's complaint because, in its view, survival of Jones' federal claim was governed by state law.[4]

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[4] If, as the district court held, the plaintiff were confined to the provisions of the Indiana wrongful death statute, the amount of recovery could not reach the $10,000 requirement of 28 U.S.C. § 1331. That statute, Ind. Code § 34-1-1-2 (Burns ed. 1970), provides that when a person's death is caused by the wrongful act or omission of another, the personal representative of the decedent may maintain an action against the wrongdoer if the injured party might have maintained an action for the wrongful act had he lived. Damages are awarded to the widow, widower, dependent children, or dependent next-of-kin. The statute also provides that if the decedent leaves no such persons surviving him, damages are limited to the reasonable value of the hospital, medical and surgical services, funeral expenses, and costs and expenses of administration. Joseph Jones, Jr. left neither widow nor dependent

II

The Supreme Court recently addressed the issue of survival of a federal claim in *Robertson* v. *Wegmann*, 98 S.Ct. 1991 (1978). In that case, Clay Shaw filed an action under 42 U.S.C. § 1983 against several defendants for bad faith prosecution. He died several months before the trial was set. After the executor of Shaw's estate was substituted as plaintiff, various defendants moved for dismissal of the action on the ground that the cause abated with Shaw's death. The district court thus had to determine whether the survival of the action was governed by state or federal law.

Because the action was brought under section 1983, the trial court referred to 42 U.S.C. § 1988 which provides that when federal law is deficient as to a suitable remedy, the relevant state law shall govern "so far as the same is not inconsistent with the Constitution and laws of the United States." [5]

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children or next-of-kin surviving him. Because Jones was in federal prison during this period, the listed items patently could not total $10,000.

It is important, however, to characterize plaintiff's complaint properly. The district court erred in its characterization. The plaintiff is suing neither for deprivation of another's constitutional rights nor on the independent, statutorily created cause of action such as an action for wrongful death. Rather, she is asserting her son's cause of action as the administratrix of his estate.

[5] 42 U.S.C. § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern the said courts in the trial and disposition of the cause. (emphasis added)

The federal civil rights laws do not provide for survival. Under Louisiana law the action would abate since no person with the requisite relationship to Shaw survived him. Both the district court and the Fifth Circuit held Louisiana law to be inconsistent with the broad remedial purposes of the Civil Rights Acts. They therefore fashioned a federal common law of survival in favor of the estate. The Supreme Court reversed.

The Court ruled that questions of inconsistency between state and federal law raised under section 1988 should be resolved by looking not only at the relevant federal statutes and constitutional provisions, but also at the policies expressed in them. The Court recognized two policies underlying a section 1983 cause of action: "[1] compensation of persons injured by deprivation of federal rights and [2] prevention of abuses of power by those acting under color of state law." 98 S.Ct. at 1995. Because of the peculiar facts of the case, the Court found that ap-

plication of the state survivorship statute would not have an "independent adverse effect" on those policies.[6] The Court also noted that the state survivorship law neither excluded survival of all tort actions nor significantly restricted the types of actions that survive. The Court held the Louisiana statute not inconsistent with the underlying policies of section 1983 and therefore applicable.

Because *Robertson* dealt with a claim under section 1983, the Court was required to apply section 1988 and adopt Louisiana law unless that law was found to be inconsistent with "the Constitution and laws of the United States," that is, the policies underlying the Civil Rights Acts. The Court found no inconsistency. Because the instant action involves a *Bivens*-type claim, section 1988 has no statutory effect. Nonetheless, because actions brought under the Civil Rights Acts and those of the *Bivens*-type are conceptually identical and further the same policies, courts have frequently looked to the Civil Rights Acts and their decisional gloss for guidance in filling the

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[6] The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate. And, given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality, at least in situations in which there is no claim that the illegality caused the plaintiff's death.

98 S.Ct. at 1996 (footnote omitted).

gaps left open in *Bivens*-type actions.[7] Accordingly, an analysis similar to that developed in *Robertson* should be used in the case at bar.

We first note the absence of any applicable federal survivorship rule. Consequently, we turn to "the common law, as modified and changed by the Constitution and statutes of the [forum] State. . . ." Indiana does have a survivorship statute, but its application to this federal claim would leave the plaintiff without a remedy.[8] In determining whether application of Indiana's law is "inconsistent with the Constitution and laws of the United States," we must consider whether application of that law would frustrate the federal policies underlying *Bivens*. We hold that it would.

Bivens recognized the existence of a federal substantive right based directly on the Fourth Amendment and held that the courts have power to create a damage remedy for injuries suffered as a result of

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[7] *See Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977); *Paton* v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975); *Mark* v. *Groff*, 521 F.2d 1376 (9th Cir. 1975).

[8] Under the Indiana survival statute, Ind. Code § 34-1-1-1 (Burns ed. 1970), a decedent's personal representative may maintain an action only if the decedent "receive[d] personal injuries caused by the wrongful act or omission of another and thereafter die[d] from causes *other* than said personal injuries so received." (emphasis added) Although Joseph Jones, Jr. died allegedly as the result of physical maltreatment, his death was not the result from causes other than the alleged wrongdoing. Thus the only cause of action for personal injury permitted to survive under Indiana law encompasses a factual situation different from that alleged in this case.

the violation of that right by federal officials. Numerous courts have extended the rationale of *Bivens* to other types of claims.[9] Such an extension should be made discreetly, but when appropriate courts should do so. The federal policies of compensation and deterrence which underlie section 1983, noted by the Court in *Robertson*, are equally applicable here. Because Jones, Jr.'s estate is suing, the policy of compensating the injured person would not be thwarted by abatement. It is the second concern, prevention of abuse of power by officials, which distinguishes this case from *Robertson*. Unlike Shaw, Jones, Jr. is alleged to have died as a *result* of the deprivation of his civil rights. In *Robertson* the Court expressly intimated no view about whether abatement based on state law would be allowed in that situation. We hold that the "inconsistency" which would be created by application of the state law necessitates the creation of a federal common law of survival in a case such as that before us.

The question whether a federal action survives was recently considered by this court in *Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977). Beard's mother, as

[9] *See Briggs* v. *Goodwin*, 569 F.2d 10, 17 n. 8 (D.C. Cir. 1977), and *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1364 n. 23 (9th Cir. 1977), for a listing of cases in which courts either extended *Bivens* to cover violations of other rights or indicated they would look favorably on such an extension. Several courts have rejected extension, although only in one case was the plaintiff attempting to recover damages from federal officials. *See Davidson* v. *Kane*, 337 F. Supp. 922, 925 (E.D. Va. 1972) (no extension to Fifth Amendment due process claim).

administratrix for her son's estate, filed a suit for damages in federal court alleging that a Chicago policeman and several FBI agents had murdered her son. The claim against the policeman was brought under the Civil Rights Acts, 42 U.S.C. §§ 1981 *et seq.*, while the claim against the FBI agents was brought pursuant to *Bivens*. Noting that neither the Civil Rights Acts nor the Supreme Court's decision in *Bivens* addressed the issues of abatement or survival of such actions, this court said that "most courts that have considered the question of the survival of federal civil rights claims have looked to state law, either on the authority of 42 U.S.C. § 1988 or simply because reference to state law obviated the need to fashion an independent federal common law rule." *Id.* at 333. As to the claim under the Civil Rights Acts, this court, pursuant to the authority of section 1988, borrowed the Illinois Survival Act [10] because that statute was deemed completely consistent with the Constitution and the laws of the United States. As to the plaintiff's *Bivens* claim we said, "[T]he adoption of

[10] The Illinois Survival Act, Ill. Rev. Stat. ch. 3, § 339, provides:

> In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of "An Act relating to alcoholic liquors," approved January 31, 1934, as amended.

state law likewise seems warranted since it is consistent with the federal policies underlying *Bivens*." *Id.*

The same underlying policies dictate our decision here. It would be anomalous as well as ironic to hold that Jones, Jr. could have sought redress for violation of his constitutional rights had he survived the alleged wrongdoing, but because the wrongdoing caused his death, the law is impotent to provide a remedy to benefit his estate. Such a holding would not only fail to effectuate the policy of allowing complete vindication of constitutional rights; it would subvert that policy. Although the Fifth Circuit in *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir. 1961), was concerned with survival of an action brought under the civil rights statutes (and not a *Bivens*-type action), Judge Brown's language is apposite:

> [I]t defies history to conclude that Congress purposely meant to assure the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.

293 F.2d at 404. Allowing recovery for injury but denying relief for the ultimate injury—death—would mean that it would be more advantageous for a tortfeasor to kill rather than to injure. Surely this cannot be the intent of the law.

The essentiality of the survival of civil rights claims for complete vindication of constitutional rights is buttressed by the need for uniform treatment of those claims, at least when they are against federal officials.[11] As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard* the Illinois statute permitted survival of the *Bivens* action. The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. It should also be noted that because federal prison authorities decide the prison where a prisoner is incarcerated, those authorities in a sense choose the state in which the wrong occurs. This is an additional reason why the survivorship law of the particular state should not cut off recovery. In sum, we hold that whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.

III

The federal defendants challenge the sufficiency of the complaint to state a claim for damages under the

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[11] For a discussion of the desirability of uniformity, *see* Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1523-24, 1529-31 (1969). In *Robertson* the Court rejected this argument in relation to section 1983 claims, 98 S.Ct. at 1997 n. 11, by relying heavily upon congressional guidance through section 1988. However, since that section has no statutory effect on *Bivens*-type actions, and we find that this is an area of law in which courts must be free to develop federal common law, *Robertson's* rejection of the desirability of uniformity has no bearing on the case here.

Constitution. They contend that plaintiff's allegations merely assert a medical malpractice claim against the individual defendants cognizable in the state courts. We note that state law would apply to a claim of medical malpractice by federal employees. However, if the suit were against the federal government, it would be filed in federal court pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, not in state court. *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). Of significance also is the fact that the Tort Claims Act only applies to claims for injuries suffered as the result of the negligence of government employees and not for intentional torts, 28 U.S.C. § 2680(h). Plaintiff's claim here alleges serious deprivation of constitutional rights, not mere negligence. As the district court stated, "[G]iven the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under § 1331 alleging a denial of proper medical treatment. *Estelle* v. *Gamble* [429 U.S. 99 (1976)]." In so ruling the district court could properly consider the plaintiff's allegations that Jones, Jr. was denied medical treatment "so clearly inadequate as to amount to a refusal to provide essential care, so inappropriate as to evidence intentional maltreatment causing death."

We agree with the district court's appraisal. In *Estelle* the Supreme Court recognized that

> [a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst

> cases, such a failure may actually produce physical "torture or a lingering death," . . . the evils of most immediate concern to the drafters of the [Eighth] Amendment.

429 U.S. at 103. The Court concluded:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

429 U.S. at 104-05 (citations omitted). Under the criteria delineated in *Estelle*, the alleged conduct of the federal defendants rises to the level of constitutional violations.

The status of the Joint Commission on Accreditation of Hospitals as well as its exact participation in the alleged events are unclear. Neither the allegations of the complaint nor counsels' arguments are helpful. Because we are left in the dark on this phase of the case, we decline to rule on the issue of whether the Commission should have been dismissed as a defendant under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IV

Preliminary to dismissing the complaint, the district court dismissed Norman A. Carlson, the Director of the Federal Bureau of Prisons, and Robert T.

Brutshe, the Assistant Surgeon General of the United States, on the ground that they had not been personally served by summons as required by Rule 4(d)(1) of the Federal Rules of Civil Procedure. We agree with the plaintiff, in challenging the dismissal, that Rule 4(d)(1) is inapplicable. Carlson and Brutshe, non-inhabitants of the State of Indiana, were served with summons by certified mail in accordance with the provisions of Rule 4(e) and (f). Under those provisions a plaintiff may resort to state procedures for effecting service on non-resident parties, in this case Indiana Trial Rule 4.4 which provides for service by certified mail. Both defendants had contacts with Indiana sufficient to permit use of this provision and to meet the requirements of due process. Carlson, as Director of the Federal Bureau of Prisons, is responsible for the management of the federal prison system. Brutshe, as Assistant Surgeon General of the United States, is responsible for monitoring the medical services at the Terre Haute prison. Accordingly, the service of process upon Carlson and Brutshe by certified mail was proper.

The judgment of the district court is reversed except as to the dismissal of defendant C. L. Benson.[12] The cause is remanded for further proceedings.

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[12] Plaintiff does not raise the issue of the dismissal of defendant Benson, the warden of the Terre Haute prison at the time of Joseph Jones, Jr.'s death. He was not personally served with summons; instead, his successor in office was served by the marshal. Under the circumstances, the dismissal of defendant Benson was proper.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 3, 1978

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

HON. ROBERT A. GRANT, *Senior District Judge**

No. 77-1334

MRS. MARIE GREEN, Administratrix of the Estate of
JOSEPH JONES, JR., PLAINTIFF-APPELLANT

vs.

NORMAN CARLSON, Director, Federal Bureau of
Prisons, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana
Terre Haute Division

No. TH 76-93-C—JAMES E. NOLAND, *Judge*

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* The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, except as to the dismissal of defendant C. L. Benson, and REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 24, 1978

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

HON. ROBERT A. GRANT, *Senior District Judge**

No. 77-1334

MRS. MARIE GREEN, Administratrix of the Estate of JOSEPH JONES, JR., PLAINTIFF-APPELLANT

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana
Terre Haute Division

No. TH 76-93-C—JAMES E. NOLAND, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-

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* Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

entitled cause by counsel for the federal defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administratrix of the estate of JOSEPH JONES, JR., PLAINTIFF

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL, DEFENDANTS

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND ENTRY OF JUDGMENT THEREON

This cause comes before the Court upon the motions of various of the defendants herein seeking the Court to dismiss the plaintiff's action for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for insufficient service of process as to certain of the defendants, pursuant to Rules 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure, and for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Whereupon the Court, having examined and considered the above motions and briefs filed in support

thereof and in opposition thereto, and now being duly advised in the premises, the Court finds as follows:

1. Defendants Norman A. Carlson, Charles L. Benson, and Robert L. Brutsche are entitled to be DISMISSED from this action for failure to be properly served with process herein.

2. This entire cause should be DISMISSED for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defendants Carlson, Benson and Brutsche are hereby DISMISSED from this action and the plaintiff's complaint against all defendants herein is hereby DISMISSED for lack of subject matter jurisdiction, JUDGMENT is hereby entered in favor of the defendants herein.

DATED this 10th day of January, 1977.

/s/ James E. Noland
JAMES E. NOLAND
U. S. District Judge

MEMORANDUM ENTRY

The plaintiff has filed this action as Administratrix of the estate of Joseph Jones, Jr. seeking monetary relief from the defendants by reason of Jones' death while he was a federal prisoner incarcerated in the United States Penitentiary at Terre Haute, Indiana.

Named as defendants herein include six officials, officers, and employees of the Bureau of Prisons who have been sued in their official and individual capacities. Also named as a defendant herein is the Joint Commission on Accreditation of Hospitals, which allegedly is responsible for inspecting and accrediting the hospital at the Terre Haute Penitentiary. The plaintiff asserts that Jones died as a result of improper medical treatment rising to the level of a constitutional violation on the part of prison officials. Subject matter jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

The first issue for resolution by the Court concerns the motion to dismiss filed by defendants Carlson, Benson, and Brutsche seeking dismissal herein for the plaintiff's failure to properly serve them with process in accordance with Rule 4 of the Federal Rules of Civil Procedure. From the Court records it appears that defendants Carlson and Brutsche were only served with process by certified mail and that defendant Benson was not served at all. In light of the fact that the plaintiff is attempting to recover damages from each defendant herein personally the substituted service provisions of Rule 4(d)(5) of the Federal Rules of Civil Procedure are not applicable. *Griffith* v. *Nixon*, 518 F.2d 1195 (2nd Cir. 1975); *Green* v. *Laird*, 357 F. Supp. 227 (N.D. Ill. 1973). Therefore, such defendants are entitled to a dismissal from this action until such time as they are personally served with process in a proper manner as provided by Rule 4(d) of the Federal Rules of Civil Procedure.

Were it not for the lack of subject matter jurisdiction herein the above described defects in service could easily be cured and this action could proceed accordingly. However, the Court believes the jurisdictional amount requirement of 28 U.S.C. § 1331 cannot be satisfied herein and, therefore, this entire action should be DISMISSED.

Accepting as true the plaintiff's allegations that Jones died as a result of a wanton and intentional denial of adequate medical care by the prison officials named as defendants herein, the Court initially recognizes that "deliberate indifference to a prisoner's serious illness or injury" can amount to cruel and unusual punishment proscribed by the Eighth Amendment. *Estelle* v. *Gamble*, 45 U.S.L.W. 4023, 4025 (Nov. 30, 1976); see also *Thomas* v. *Pate*, 493 F.2d 151 (7th Cir.), *cert. denied sub nom. Thomas* v. *Cannon*, 419 U.S. 879 (1974). It is also generally accepted that a direct action based upon 38 U.S.C. § 1331 may be brought against federal officials and others acting under color of federal law for violations of an individual's constitutional rights provided the $10,000 amount in controversy requirement can be satisfied. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

With respect to the jurisdictional amount issue herein, the Court is aware that "liberal standards" are to be used in ascertaining the existence of the necessary amount in controversy in cases brought under § 1331 alleging a constitutional denial. *Calvin* v. *Conlisk*, 520 F.2d 1, 9 (7th Cir. 1975), vacated on

other grounds, 424 U.S. 902 (1976). In light of such standard, the Court believes that given the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under § 1331 alleging a denial of proper medical treatment. *Estelle* v. *Gamble, supra.* However, since Jones has died neither leaving any dependents nor having incurred medical or burial expenses sufficient to satisfy the $10,000 requirement, it is not possible for the plaintiff herein to maintain this action under the Indiana wrongful death or survival statutes, *Ind. Ann. Stats.* §§ 34-1-1-1 - 34-1-1-2 (Burns' Code Ed.). Although the plaintiff insists in her brief that this is not an action "for pecuniary loss of support" based on any state statutes like the above, the Court believes that such statutes are the sole mechanism by which the personal representative of a decedent's estate may maintain an action for damages arising from the decedent's death. The plaintiff obviously is attempting to avoid the limitations on recovery inherent in the statutory remedy and characterizes this is an action "of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages." The Court does not believe that such an action exists other than as set out in the wrongful death and survival statutes.

It is recognized that one person may not generally seek redress for constitutional deprivations suffered by another. *United States* v. *Raines*, 362 U.S. 17 (1960). At common law the plaintiff herein could not have maintained an action such as this on behalf

of the decedent's estate since such actions did not generally survive the injured person's death. It is apparent the plaintiff seeks the benefit of the wrongful death statute to provide her with standing to bring this action on behalf of Jones' estate, but yet she asserts such statute is not applicable to her action. The plaintiff should not be able to accept the benefits conferred by such statute without assuming the limitations imposed therein as well.

Any recovery in an action such as this is limited to the pecuniary loss of dependents and the reasonable hospital, medical, and burial expenses incurred by the decedent. Since the plaintiff makes no claim for pecuniary loss as a dependent of Jones and there were no medical or hospital expenses herein, it is apparent that the plaintiff cannot "in good faith" satisfy the jurisdictional amount requirement. To this end it is also interesting to note that in the Petition for Letters of Administration filed in Jones' Estate in the Probate Division of the Circuit Court of Cook County, Illinois, the plaintiff stated Jones' estate consisted of nothing more than a personal "cause of action" worth $500.

In light of the above, the Court concludes that it lacks subject matter jurisdiction over this cause under 28 U.S.C. § 1331. Therefore, the plaintiff's complaint is DISMISSED and JUDGMENT is entered in favor of the defendants herein.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1261

NORMAN A. CARLSON, DIRECTOR FEDERAL BUREAU OF PRISONS, ET AL.,

Petitioners

—*v.*—

MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FILED FEBRUARY 13, 1979
CERTIORARI GRANTED JUNE 18, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1261

NORMAN A. CARLSON, DIRECTOR FEDERAL BUREAU OF PRISONS, ET AL.,

Petitioners

—*v.*—

MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX TO APPENDIX *

* The memorandum and order of the district court, dated January 10, 1977, the court of appeals' opinion and judgment, dated August 3, 1978, and the order of the court of appeals denying rehearing, dated November 24, 1978, are contained in the appendices to the petition for a writ of certiorari (Pet. App. A-D).

DOCKET ENTRIES

Number TH 76-93-C

GREEN, MRS. MARIE, Administrator of the estate of JOSEPH JONES, JR., (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFFS

v.

CARLSON, NORMAN, Director Federal Bureau of Prisons; BENSON, C. L., Warden, Terre Haute Penitentiary; BRUTSCHE, ROBERT L., M.D., Ass't Surgeon General; JOINT COMMISSION ON ACCREDITATION OF HOSPITALS; DEGARCIA, DR. BENJAMIN B., Chief Medical Officer; (Medical) WALTERS, WILLIAM (Training) Officer BARRY, EMMETT, Staff Officer, DEFENDANTS

DATE	PROCEEDINGS
6/18/76	Plaintiff files complaint, 4 counts and request for trial by Jury. Civil cover sheet filed. Summons issued.
8/9/76	Mann, Mann, Chaney, Johnson & Hicks file appearance for defendant Joint Commission on Accreditation of Hospitals. Said defendant files motion for enlargement of time and request for production, c/s.
8/10/76	U. S. Marshal makes return on summons. $32.68
8/11/76	Motion of defendant, Joint Commission of Accreditation of Hospitals for enlargement of time GRANTED and time extended to Oct. 8, 1976.
8/30/76	Respondents file motion for extension of time, c/s.
9/2/76	Defendants motion for extension of time GRANTED and defendant ORDERED to respond by Oct. 7, 1976.
9/3/76	Plaintiff, by counsel, files answer to request for production, with attachments thereto.
10/7/76	Defendant Joint Commission on Accreditation of Hospitals files motion to dismiss with memorandum in support of said motion, c/s.

DATE	PROCEEDINGS

10/20/76 Set for pre-trial Nov. 19, 1976, at 2:45 P.M. (CJH)

11/1/76 Defendants, EXCEPT Joint Association, file answer, 1st, 2nd, 3rd, 4th, 5th and 6th defense and counts 1, 2, 3 and 4, c/s.

11/19/76 Court vacates pre-trial conference scheduled for this date. Further that defendants file briefs in support of 2nd, 3rd and 4th defenses by Dec. 15, 1976; that plaintiffs be allowed to Jan. 3, 1977 to file answer briefs and defendants be allowed to Jan. 14, 1977, to file reply briefs.

11/30/76 Plaintiff files answer to motion to dismiss of defendant Joint Commission on Accreditation of Hospitals, c/s.

11/30/76 Set for pre-trial Dec. 22, 1976 at 10:00 A.M. (CJH)

12/2/76 Defendant, Joint Commission on Accreditation of Hospitals, files reply to plaintiff's answer brief, c/s.

12/15/76 The Federal defendants file motion to reconsider entry of Nov. 19, 1976, c/s. Said defendants also file motion to dismiss for lack of service, with memorandum in support thereto, c/s.

12/20/76 Plaintiff files motion to postpose pre-trial conference, c/s.

12/21/76 Motion to postpose pre-trial conference Granted and cause continued from pre-trial and trial calendars.

1/3/77 Plaintiff files memorandum in opposition to motion to dismiss defendants Carlson, Lenson and Brutsche, c/s.

1/11/77 Plaintiff files motion for leave to further plead, c/s.

1/10/77 This cause came before the Court upon the various motions to dismiss of the defendants herein. Court having examined and considered same, IT IS ORDERED that plaintiff's complaint against all defendants herein

DATE	PROCEEDINGS

is hereby DISMISSED for lack of subject matter jurisdiction and JUDGMENT is hereby entered in favor of the defendants herein S.E. O.B. Vol. 8-P.9 (case closed)

1/13/77 Plaintiff's motion for leave to further plead DENIED.

3/4/77 Plaintiff files notice of appeal. Plaintiff's $250.00 cash cost bond applied as appeal bond.

U.S. COURT OF APPEALS
SEVENTH CIRCUIT—DOCKET

General No. 77-1334

MRS. MARIE GREEN, Administratrix of the Estate of Joseph Jones, Jr., PLAINTIFF-APPELLANT

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS-APPELLEES

DATE	FILINGS-PROCEEDINGS
3/23/77	Entered order adopting the following procedural schedule: (1) appellant to pay docketing fee (2) district court clerk to prepare record (3) record to be filed before April 6, 1977 (4) appellant's brief due April 25, 1977 (5) appellee's brief due June 8, 1977 (6) appellant's reply brief due June 22, 1977
4/20/77	Filed o&3c appellant's motion for extension of time to file brief.
4/21/77	Entered order extending time for filing appellant's brief to May ?, 1977; further ordered that appellees' brief is due June 17, 1977 and that appellant's reply brief is due July 1, 1977.
5/9/77	Filed 15c appellant's brief, svc.
6/13/77	Filed 15c appellee's brief, svc. (Joint Comm. on Accred. of Hosp.
6/20/77	Filed 15c appellees' brief, svc.
6/24/77	Filed o&3c appellant's motion for extension of time to file reply brief,
6/27/77	Entered order extending time for filing appellant's reply brief, to July 15, 1977.

DATE	FILINGS-PROCEEDINGS
7/18/77	Filed 15c appellant's reply brief, svc.
10/5/77	Entered order setting appeal for oral argument on Nov. 3, 1977 9:30. Oral argument limited to 20 min. per side.
10/18/77	Filed o&6c appellant's additional authority, svc. dist.
11/3/77	Heard and taken under advisement.
11/7/77	Filed o&3c appellant's motion to copy audio recording of oral argument, svc.
11/8/77	Entered order granting appellant's motion to copy audio recording of oral argument.
11/9/77	Filed o&6c appellees' additional authority, svc. dist.
8/3/78	Filed an opinion by Judge Swygert.
8/3/78	Entered final judgment order REVERSED, with costs, except as to dismissal of defendant C. L. Benson, and REMANDED.
8/11/78	Filed O&3c of appellee's motion for extension of time to file pet. for rehearing; svc.
8/17/78	Entered order granting appellee's motion of 8/11/78 for filing petition for rehearing is extended up to 9/18/78.
9/18/78	Filed 25c of appellee's petition for rehearing; dist., en banc., svc.
10/3/78	Filed 1c of letter from clerk to counsel for appellant requiring answer to appellees' petition for rehearing en banc by 10/13/78.
10/26/78	Filed 25c of appellee's additional authority; dist., en banc., svc.
10/26/78	Filed O&3c of motion for extension of time to file appellant's answer to appellees' petition for rehearing en banc; affd., svc.

DATE	FILINGS-PROCEEDINGS

10/27/78 Entered order GRANTING appellant's motion of 10/26/78. The time within which the appellant must file her answer to the appellee's petition for rehearing in banc is extended up to 11/7/78.

11/24/78 Entered order denying appellee's petition for rehearing.

12/1/78 Filed o&3c application for stay of mandate pending filing of petition for cert, svc.

12/7/78 Entered order granting motion of 12/1/78 and the mandate of this court is Stayed up to 1/5/79 pending the filing of a petition for writ of cert. to Supreme Court of the U.S.

[Illegible] Filed O&3c of appellee's second application for stay of mandate pending filing of petition for certiorari; svc.

[Illegible] Entered order Granting application for stay of mandate only to the extent that the mandate of this court be Stayed up to 2/12/79.

2/20/79 Filed notice of filing petition for cert on 2/13/79; Supreme Court No. 78-1261.

2/26/79 Filed notice of filing petition for cert. on 2/13/79; Supreme Court No. 78-1261.

6/22/79 Entered Supreme Court order dated 6/18/79, GRANTING petition for cert.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administrator of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFF

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons; C. L. BENSON, Warden, Terre Haute Penitentiary; ROBERT L. BRUTSHE, M.D., Assistant Surgeon General; JOINT COMMISSION ON ACCREDITATION OF HOSPITALS; DR. BENJAMIN B. DEGARCIA, Chief Medical Officer; Medical Training Assistant WILLIAM WALTERS; Staff Officer EMMETT BARRY, DEFENDANTS

COMPLAINT

INTRODUCTION

From January 6 through August 14, 1975, four black prisoners at the Federal Prison in Terre Haute died because of medical care so inappropriate as to evidence intentional maltreatment. The fact that all four inmates who died were black is not a mere coincidence, since it is the non-white prisoners who are the last to receive what little medical attention is available and are the last to be admitted to the prison hospital.

The prisoners at Terre Haute have tried all peaceful means available to bring to the attention of the authorities the blatant inappropriate medical care, which threatens the lives of all of them.

Despite letters of protest to prison officials and several Congressmen and a peaceful work stoppage joined by 900 prisoners, Defendants WARDEN BENSON, DIRECTOR CARLSON and their agents did nothing to change the blatant inadequate medical conditions at Terre Haute.

The instant Complaint is a classic case of medical care which is so clearly inadequate as to amount to a refusal to provide essential care, so inappropriate as to evidence intentional maltreatment causing death. Prisoners clearly do not surrender all their constitutional rights when they enter the prison gates. Decent medical care is a basic human right which must be afforded all people, whether or not imprisoned.

JURISDICTION

1. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1331(a) and under the substantive rights created by the Constitution of the United States. Plaintiff, MRS. MARIE GREEN, next of kin and administrator of the estate of her son JOSEPH JONES (a/k/a ROSCOE SIMMONS), is suing for monetary damages for the death of her son.

PARTIES

2. Plaintiff MARIE GREEN is the next of kin and administrator of the estate of her son, JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS), who died at Terre Haute Prison from willful, wanton and criminally negligent medical care of such a degree to constitute intentional maltreatment.

3. Defendant NORMAN CARLSON is the Director of the Bureau of Prisons and is responsible for the care and management of federal prisons; sued individually and in his official capacity as Director of Bureau of Prisons.

4. Defendant C. L. BENSON is the Warden of Terre Haute Prison and is responsible for the care and management of the prisoners confined in his institution; sued individually and in his official capacity as Warden.

5. Defendant ROBERT T. BRUTSHE is the Assistant Surgeon General of the United States and is responsible for monitoring the medical services at Terre Haute Prison; sued individually and in his official capacity as Assistant Surgeon General.

6. Defendant JOINT COMMISSION ON ACCREDITATION OF HOSPITALS is in charge of inspecting hospital facilities and supplying them with accreditation if

they meet set standards. This Commission accredited the hospital at Terre Haute Penitentiary.

7. Defendant DR. BENJAMIN B. DeGARCIA was Chief Medical Officer at the time of the death of JOSEPH JONES, JR., and was directly responsible for the functioning of the prison medical services; sued individually and in his official capacity as Chief Medical Officer.

8. Defendant WILLIAM WALTERS was a Medical Training Assistant employed at Terre Haute Prison as a doctor's aide and on duty and in charge of the medical facilities on the day of JOSEPH JONES' death; sued individually and in his capacity as a Medical Training Assistant.

9. Defendant Staff Officer EMMETT BARRY, custodial guard at Terre Haute Penitentiary and on duty in the hospital on the day of JOSEPH JONES' death; sued individually and in his official capacity as Staff Officer.

COUNT I

1. The deceased JOSEPH JONES, JR. was convicted of bank robbery under the name of ROSCOE SIMMONS in 1972 and placed in the custody of the Attorney General of the United States at the Federal Bureau of Prisons under a sentence of ten years.

2. The deceased, JOSEPH JONES, JR., had a history of asthma and was diagnosed as a chronic asthmatic upon his entry into the Federal Prison System.

3. In 1973 JOSEPH JONES, JR. was given steroids for the treatment of an acute asthmatic episode, and he was treated with oral steroids intermittently over the next two years.

4. After being incarcertated in McNeil Island Penitentiary in Washington, and Leavenworth Penitentiary in Kansas, JOSEPH JONES, JR. was transferred to Terre Haute Prison in July of 1974.

5. In July of 1975, JOSEPH JONES' asthmatic condition deteriorated and he required hospitalization outside the penitentiary. For eight days he was hospitalized at St. Anthony's Hospital in Terre Haute, Indiana.

6. Upon his release from the hospital on August 6, 1975, the treating physician recommended that JONES not be sent back to Terre Haute Penitentiary, but instead that he be transferred to another climate. The doctor made two specific recommendations: Lexington, which has a good management program for chronic diseases; and Sandstone, which has a drier climate.

7. The recommendation was ignored by the Defendants and their agents. JOSEPH JONES was placed back in Terre Haute Prison, where he died eight days later.

8. On his return to the prison hospital, the deceased was not given proper medication as directed by the local hospital, nor was the treatment of steroids continued, as ordered by the physician at the local hospital.

9. On August 14, JOSEPH JONES complained of an asthma attack and was admitted to the hospital at about 3:00 p.m. From that time on, the Defendants were responsible for a course of conduct which was willful, wanton and criminally negligent and so blatantly inappropriate as to evidence intentional maltreatment, and was directly responsible for the death of JOSEPH JONES, JR.

10. Although JONES was in serious condition for eight hours before he died, no doctor was on duty, nor was any doctor called to treat him. There was a deliberate indifference to the deceased's repeated cries for essential treatment.

11. Defendant DR. BENJAMIN DeGARCIA was not present at the prison hospital on weekends, nor did he provide a procedure to check in in case of emergencies. Defendant DeGARCIA allowed a prison hospital to function with totally inadequate staff, improperly trained, and without proper equipment and procedures.

12. Medical Training Assistant WALTERS, a non-licensed nurse, was left in charge of the hospital. Although JONES was becoming more agitated and having more and more difficulty breathing, WALTERS left JONES alone with inmate nurses while he went around to the floors dispensing medications.

13. When WALTERS returned, he brought the respirator with him. WALTERS had been put on notice two

weeks prior that the respirator was broken, yet he still tried to go through the motions of administering the respirator. JONES pulled away from WALTERS, telling him that the respirator was making his breathing worse, and in fact the respirator was not functioning properly.

14. WALTERS then administered two shots of Thorazine (intervenously and intermuscularly) to JONES, who was having great difficulty breathing. The use of Thorazine is directly contradictory to the treatment necessary for someone suffering from an asthma attack.

15. About one-half hour after the second shot of Thorazine was administered, JOSEPH JONES had a respiratory arrest. Defendant Staff Officer BARRY and Medical Training Assistant WALTERS brought an emergency cart to administer an electric jolt to the deceased, but neither WALTERS nor BARRY knew how to operate this machine. JONES was pronounced dead at St. Francis Hospital in Terre Haute.

16. The death of inmate JONES was the fourth inmate death at Terre Haute resulting from inadequate medical care in a seven-month period.

17. Defendants CARLSON, BENSON and BRUTSCHE were all put on notice prior to the instant case that the medical treatment and facilities in the Terre Haute prison hospital were grossly inadequate. Letters were written to Director CARLSON and Warden BENSON complaining of the lack of proper medical care. In addition, prisoners at Terre Haute staged a work stoppage and peaceful protest to bring the serious problem of inadequate medical care to the attention of the prison authorities.

18. Despite the repeated requests for basic changes in the procedures, facilities and personnel at the Terre Haute prison hospital, Defendants CARLSON, BENSON and BRUTSHE did nothing to adequately alter the grossly inadequate medical care being administered at Terre Haute. They ignored the requests for change despite three prior inmate deaths and allowed the prison hospital to operate in a manner which perpetuated grossly inappropriate medical care.

19. Defendant Assistant Surgeon General ROBERT L. BRUTSHE is employed by the United States Public Health Service and visited Terre Haute twice in the last year to review specific cases, as well as to inspect the total medical program at Terre Haute. He gave the medical facilities his approval and failed to recommend needed changes in equipment, procedures and availability of trained medical staff.

20. THE JOINT COMMISSION ON ACCREDITATION OF HOSPITALS gave accreditation to the prison hospital despite its serious deficiencies in equipment, procedures, and availability of doctors and trained medical staff.

21. The above alleged acts of the Defendants and their agents, coupled with the complete failure of the Defendants to provide any positive medical treatment for JOSEPH JONES, JR., constitutes a course of medical care so clearly inadequate as to amount to the refusal to provide essential care. Such acts were so blatantly inappropriate as to evidence intentional maltreatment resulting in the deprivation of JOSEPH JONES, JR.'s life, in violation of the due process clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages, plus costs of this action, including attorneys fees; and such other relief as this Court deems just, proper and equitable.

COUNT II

22-42. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 22 through 43 of this Count II, as if fully set forth herein.

43. The above alleged acts of the Defendants and their agents and the complete failure to provide any positive medical treatment for JOSEPH JONES, JR., as he suffered from a severe asthma attack which resulted in the loss of his life, constituted cruel and unusual punishment, violative of the Eigth Amendment to the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages, plus the costs of this action, plus such other relief as this Court deems just and proper.

COUNT III

44-64. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 44 through 64 of this Count III, as if fully set forth herein.

65. The above alleged acts of Defendants and the absolute failure to provide a positive course of essential medical treatment was caused in part by the fact that the deceased was black, and he was denied basic humane medical treatment, which resulted in his death, on the basis of race, in violation of the equal protection component of the Fifth Amendment of the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages plus the costs of this action, including attorneys fees, and such other relief as this Court deems just and proper.

COUNT IV

66-86. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 66 through 86 of this Count IV, as if fully set forth herein.

87. The above alleged actions of the Defendants were of a malicious and intentional nature and manifest a deliberate indifference of requests for essential treatment.

WHEREFORE, Plaintiff demands judgment against the Defendants jointly and severally, for $500,000 in punitive damages, plus costs and any relief which this Court deems appropriate.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL FOUR COUNTS.

Respectfully submitted,

MICHAEL DEUTSCH
DENNIS CUNNINGHAM
CHARLES HOFFMAN

Attorneys for Plaintiff
110 South Dearborn, Room 707
Chicago, Illinois 60603
312/236-3504

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administratrix of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFF

—*vs.*—

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS

ANSWER TO REQUEST FOR PRODUCTION

Plaintiff, Mrs. Marie Green, by her attorneys, answers the request of the Defendant, Joint Commission on Accreditation of Hospitals, for the production of documents, by the production of the attached documents, to wit:

1. A copy of the Petition for Letters of Administration filed in the Circuit Court of Cook County, Illinois, in the Estate of Joseph A. Jones, Jr., Deceased, No. 76 P 3693.
2. A copy of the Order Appointing Legal Representative Of Decedent's Estate entered by the Court in the above mentioned matter.
3. A copy of the Letters of Administration issued in the above mentioned matter.

/s/ Charles Hoffman
CHARLES HOFFMAN
One of the Attorneys for Plaintiff

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
County Department, Probate Division

[Hearing on petition set for May 10, 1976,
10 a.m., Room 1804, Chicago Civic Center
Chicago, Illinois, 60602]

No. 76 P 3693
Docket 817
Page 400

ESTATE OF JOSEPH A. JONES, JR., DECEASED

PETITION FOR LETTERS OF ADMINISTRATION

Maria Jones Greene Robinson on oath states:

1. Joseph A. Jones, Jr., whose place of residence at the time of death was 4120 S. Prairie Avenue, Chicago, Cook County, Illinois, died August 14, 1975, at Terre Haute, Indiana, leaving no will.

2. Approximate value of the estate in this state:
(cause of action)
Personal $500.00 Real $ none Annual income from real estate $ none.

3. The names and post-office addresses of the decedent's heirs (*indicating all persons entitled to nominate an administrator in preference to or equally with petitioner*) are:

Name	Relationship	Right to nominate Preference—P Equally—E	Minor—M Incompentent—I	Post-office address (If unknown, so state)
Marie Jones Greene Robinson	Mother	E		4120 S. Prairie, Apt. 603 Chicago, Illinois 60653
Joseph A. Jones, Sr.	Father	E		(unknown)
Ronald Jones	Brother			1505 E. 83rd St., Chicago, Ill.
Edwina Bowman	Sister			4120 S. Prairie, Chicago, Ill.
William Greene	Brother			(same)
Adrian Greene	Brother			(same)
Theodore Andrew Jackson	Brother			(same)
Marin A. Davis	Sister		M	(same)

4. Petitioner is the natural mother of decedent and is legally qualified to act as administrator or to nominate a resident of Illinois.

I ask that letters of administration issue to the following, qualified and willing to act:

Name	Post-office address
Marie Jones Greene Robinson	4120 S. Prairie, Apt. 603 Chicago, Illinois 60663

I ask that no authorization to appraise goods and chattels issue to the following, qualified to act: (not applicable).

/s/ Maria Jones Greene Robinson
Petitioner
4120 S. Prairie, Apt. 603
Address
Chicago, Illinois
City

Signed and sworn to before me
April 28, 1976

/s/ Patricia Handlin
Notary public

Name
Michael Deutsch
Attorney for Petitioner

Address
110 S. Dearborn
Suite 707

City
Chicago
Telephone
(312) 236-3504

If a consul or consular agent is to be notified, name country: .....

MORGAN M. FINLEY
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

County Department—Probate Division

ESTATE OF JOSEPH A. JONES, JR., DECEASED

No.

Docket

Page

ORDER APPOINTING LEGAL REPRESENTATIVE
OF DECEDENT'S ESTATE

On the verified petition of Maria Jones Greene Robinson for issuance of letters as legal representative to Maria Jones Greene Robinson who has presented his bond which has been approved, or its acceptance of office,

It is ordered that letters * of administration issue to Maria Jones Greene Robinson and that no authorization to appraise goods and chattels issue to (not applicable).

....., 19..

ENTER:

.....
Judge

* Insert "testamentary," "of administration," "of administration to collect," "of administration de bonis non," "of administration with the will annexed" or "of administration de bonis non with the will annexed".

Name Michael Deutsch

Attorney for petitioner
Address 110 S. Dearborn
Suite 707

City Chicago, Illinois

Telephone (312) 236-3504

MORGAN M. FINLEY
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

County Department, Probate Division

ESTATE OF JOSEPH A. JONES, JR., DECEASED

Original
No. 76P 3693
Docket 817
Page 400

LETTERS OF OFFICE—DECEDENT'S ESTATE

Maria Jones Greene Robinson has been appointed Administrator of the estate of Joseph A. Jones, Jr., deceased, who died August 14, 1975, and is authorized to take possession of and collect the estate of the decedent and to do all acts required of him by law.

[SEAL]

Witness, May 10, 1976
MORGAN M. FINLEY
Clerk of court

CERTIFICATE

I certify that this a copy of the letters of office now in force in this estate.

Witness, May 10, 1976
/s/ Morgan M. Finley
Clerk of court

bjh

MORGAN M. FINLEY
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administrator of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFF

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS

MOTION TO DISMISS UNDER FRCP—RULE 12(b)

Defendant, Joint Commission on Accreditation of Hospitals, moves the court to dismiss plaintiff's complaint for the following reasons:

1. The court lacks jurisdiction under 28 U.S.C. 1331 (a) because the amount in controversy is less than Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

2. The complaint fails to state a claim against this defendant upon which relief can be granted.

MANN, MANN, CHANEY, JOHNSON
& HICKS
33 S. 6th St., P. O. Box 1643
Terre Haute, IN 47808
(812) 232-0107

By /s/ [Illegible]
Attorneys for Joint Commission on
Accreditation of Hospitals

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Cause No. TH 76-93-C

MRS. MARIE GREEN, Administrator of the Estate of Joseph Jones, Jr., also known as Roscoe Simmons, and next of kin of Joseph Jones, Jr.

v.

NORMAN CARLSON, Director, Federal Bureau of Prisons; CHARLES E. BENSON, Warden, Terre Haute Penitentiary; ROBERT L. BRUTSHE, M. D.; Assistant Surgeon General; DR. BENJAMIN B. DEGARCIA, Chief Medical Officer; WILLIAM WALTER, Medical Technical Assistant; EMMETT C. BARRY, Correctional Officer

ANSWER

The defendants Norman Carlson, Director, Federal Bureau of Prisons, Charles L. Benson, Warden, Terre Haute Penitentiary, Robert L. Brutshe, M. D., Assistant Surgeon General, Dr. Benjamin deGarcia, Chief Medical Officer, Walter Walter, Medical Technical Assistant, and Emmett C. Barry, Correctional Officer, by counsel, for answer to plaintiff's complaint state as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of the complaint.

SECOND DEFENSE

The Court lacks jurisdiction over the person of the defendants.

THIRD DEFENSE

There is an insufficiency of process as to defendants Carlson, Benson, and Brutshe.

FOURTH DEFENSE

There is an insufficiency of service of process as to defendants Carlson, Benson and Brutshe.

FIFTH DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SIXTH DEFENSE

The above-named defendants for admission and denial to the paragraphs of plaintiff's complaint state that they;

1. Deny the allegations in paragraph 1.
2. Deny the allegations in paragraph 2.
3. Admit the allegations in paragraph 3.
4. Deny the allegations in paragraph 4.
5. Admit the allegations in paragraph 5, except to state that the name of the hospital is the Terre Haute Regional Hospital.
6. Are without knowledge or information sufficient to form a belief as to the truth of the allegation in the first sentence of paragraph 6, and they admit the allegation in the second paragraph of paragraph 6.
7. Admit the allegations in paragraph 7.
8. Admit the allegations in paragraph 8, except to state that the title of William Walter was Medical Technical Assistant.
9. Admit the allegations in paragraph 9, except to state that the title of Emmett Barry was Correctional Officer.

COUNT I

1. Admit the allegations of paragraph 1, except to state that the deceased was sentenced on January 23, 1973.
2. Deny that Joseph Jones, Jr., was diagnosed as a "chronic" asthmatic upon his entry into the Federal Prison System, and admit the remaining allegations.

3. Admit the allegations of paragraph 3.
4. Admit the allegations of paragraph 4.
5. Admit the allegations of paragraph 5.
6. Admit the allegations of paragraph 6.
7. Deny the allegations in the first sentence of paragraph 7, and admit the remaining allegations.
8. Deny the allegations in paragraph 8.
9. Admit the allegations in the first sentence of paragraph 9, and deny the remaining allegations.
10. Deny the allegations in paragraph 10.
11. Deny the allegations in paragraph 11.
12. Deny the allegations in paragraph 12.
13. Deny the allegations in paragraph 13.
14. Deny the allegations in paragraph 14.
15. Deny the allegations in paragraph 15.
16. Admit that the death of inmate Jones was the fourth inmate death at Terre Haute in approximately a seven-month period, but deny that such deaths resulted from inadequate medical care.
17. Admit that conclusory complaint letters were received about the medical facilities and that a work stoppage occurred, but deny the remaining allegations in paragraph 17.
18. Deny the allegations in paragraph 18.
19. Admit the allegations contained in paragraph 19, and deny the remaining allegations.
20. Admit that The Joint Commission On Accreditation of Hospitals gave accreditation to the prison hospital, and deny the remaining allegations.
21. Deny the allegations in paragraph 21.

Wherefore, the above-named defendants ask that the plaintiff take nothing by way of the complaint, that judgment be entered in favor of the defendants plus the costs of this action, and for such relief as the Court deems just and proper.

COUNT II

22-42. The above-named defendants reallege and incorporate by reference their responses to paragraphs 1 through 21 of Count I as their responses to paragraphs 22 through 42 of Count II.

43. The above-named defendants deny the allegations in paragraph 43.

Wherefore, the above-named defendants ask that the plaintiff take nothing by way of the complaint, that judgment be entered in favor of the defendants plus the costs of this action, and for such relief as the Court deems just and proper.

COUNT III

44-64. The above-named defendants reallege and incorporate by reference their responses to paragraphs 1 through 21 of Count I as their responses to paragraphs 44 through 64 of Count III.

65. The above-named defendants deny the allegations in paragraph 66.

Wherefore, the above-named defendants ask that the plaintiff take nothing by way of the complaint, that judgment be entered in favor of the defendants plus the costs of this action, and for such relief as the Court deems just and proper.

COUNT IV

66-86. The above-named defendants reallege and incorporate by reference their responses to paragraphs 1 through 21 of Count I as their responses to paragraphs 66 through 86 of Count IV.

87. The above-named defendants deny the allegations in paragraph 87.

Wherefore, the above-named defendants ask that the plaintiff take nothing by way of the complaint, that judgment be entered in favor of the defendants plus the costs of this action, and for such relief as the Court deems just and proper.

Respectfully submitted,

JAMES B. YOUNG
United States Attorney

By /s/ Richard L. Darst
RICHARD L. DARST
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Cause No. TH 76-93-C

MRS. MARIE GREEN, Administrator of the Estate of Joseph Jones, Jr., also known as Roscoe Simmons, and next of kin of Joseph Jones, Jr.

v.

NORMAN CARLSON, Director, Federal Bureau of Prisons; CHARLES E. BENSON, Warden, Terre Haute Penitentiary; ROBERT L. BRUTSHE, M. D.; Assistant Surgeon General; DR. BENJAMIN B. DEGARCIA, Chief Medical Officer; WILLIAM WALTER, Medical Technical Assistant; EMMETT C. BARRY, Correctional Officer

MOTION TO DISMISS FOR LACK OF SERVICE

The defendants Norman Carlson, Director, Federal Bureau of Prisons, Charles L. Benson, Terre Haute Penitentiary, and Robert L. Brutsche, M.D., Assistant Surgeon General, move to dismiss the complaint as against them for the reasons of insufficiency of process and insufficiency of service of process.

Respectfully submitted,

JAMES B. YOUNG
United States Attorney

By /s/ Richard L. Darst
RICHARD L. DARST
Assistant United States Attorney

SUPREME COURT OF THE UNITED STATES

No. 78-1261

NORMAN A. CARLSON, Director, Federal Bureau of Prisons, ET AL., PETITIONERS

v.

MARIE GREEN, Administratrix of the Estate of Joseph Jones, Jr.

ORDER ALLOWING CERTIORARI. Filed June 18, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 297887 43

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1261

NORMAN A. CARLSON, DIRECTOR
FEDERAL BUREAU OF PRISONS, ET AL.,

PETITIONERS

v.

MARIE GREEN, ADMINISTRATRIX OF THE
ESTATE OF JOSEPH JONES, JR.,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JONATHAN C. MOORE
G. FLINT TAYLOR
CHARLES HOFFMAN
Attorneys for the Respondent

Haas, Moore, Schmiedel & Taylor
Suite 1607
343 South Dearborn
Chicago, Illinois 60604
312/663-5046

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations	Pages
28 U.S.C. §1331(a)	4, 5, 7
28 U.S.C. §1346(b)	6, 8
28 U.S.C. §2671 et seq.	6, 8
28 U.S.C. §2672	8
28 U.S.C. §2674	8
28 U.S.C. §2680(h)	9
42 U.S.C. §1981 et seq.	12
42 U.S.C. §1983	13, 15
42 U.S.C. §1988	12, 14
Ind. Ann. Stat. §34-1-1-1	13
Miscellaneous	
S. Rep. No 93-588, 93rd Cong, 2nd Sess. [1974] U.S. Code Cong & Admin News, p. 2791	9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1261

NORMAN A. CARLSON, DIRECTOR
FEDERAL BUREAU OF PRISONS, ET AL.,

PETITIONERS,

v.

MARIE GREEN, ADMINISTRATRIX OF THE
ESTATE OF JOSEPH JONES, JR.,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 581 F 2d 669 (7th Cir. 1978)(Appendix A of Petitioners' Brief). The Seventh Circuit's denial of the petition for rehearing and suggestion for rehearing in banc is set forth in Appendix C of the Petitioners' Brief. The decisions of the trial court are set forth in Appendix B and D of the Petitioners' Brief.

QUESTIONS PRESENTED

1. Whether, in circumstances in which the Federal Tort Claims Act provides an adequate federal remedy, an alternative remedy should be found to be implied under the Eighth Amendment.

2. Whether, if the Eighth Amendment creates such a right, survival of that action is governed by federal common law rather than the state statutes that apply to analogous cases.

STATEMENT OF THE CASE

The Respondent, Mrs. Marie Green, is the next of kin and Administratrix of the Estate of Joseph Jones, Jr., her deceased son. Joseph Jones, Jr. was the last of four Black prisoners at the Federal Correctional Institution at Terre Haute, Indiana, to die, between January and August of 1975, as a result of medical care so inappropriate as to evidence deliberate indifference to serious medical needs.

At the time of his death on August 15, 1975, Joseph Jones, Jr., was serving a ten-year sentence at Terre Haute for bank robbery. He had been diagnosed as a chronic asthmatic in 1972 when he entered the federal prison system. In July, 1975, the prisoner's asthmatic condition required hospitalization for eight days at St. Anthony's Hospital in Terre Haute. Despite the recommendation of the treating physician at St. Anthony's that he be transferred to a prison in a more favorable climate, Jones was returned to the Terre Haute prison. There he was not given proper medication and did not receive the steriod treatments ordered by the physician at St. Anthony's.

On August 15 Jones was admitted to the prison hospital with an asthmatic attack. Although he was in serious condition for some eight hours, no doctor saw him because none was on duty and none was called in. Defendant Dr. Benjamin De Garcia, the chief medical officer directly responsible for the prison medical services, did not provide any emergency procedure for those times when a physician was not present. As time went on Jones became more agitated and his breathing became more difficult. Although Jones' condition was serious, defendant Medical Training Assistant William Walters, a non-licensed nurse then in charge of the hospital, deserted Jones for a time to dispense medication elsewhere in the hospital. On his return to Jones, Walters brought a respirator and attempted to use it despite the fact that Walters had been notified two weeks earlier that the respirator was broken. After Jones pulled away from the respirator and told Walters that the machine was making his breathing worse, Walters administered two injections of Thorazine, a drug contraindicated for one suffering an asthmatic attack. A half-hour after the second injection Jones suffered a respiratory arrest. Walters and Staff Officer Emmett Barry brought emergency equipment to administer an electric jolt to Jones, but neither man knew how to operate the machine. Jones was then removed to St. Francis Hospital in Terre Haute; upon arrival he was pronounced dead.

On June 18, 1976, Mrs. Green filed a complaint on behalf of her deceased son's estate. Named as Defendants were six officials, officers and employees of the Federal Bureau of Prisons, sued in their official and individual capacity. Also named as a Defendant was the Joint Commission on Accreditation of Hospitals, which was responsible for accrediting and inspecting the prison hospital at Terre Haute.

The complaint alleged that Joseph Jones, Jr., died as a result of medical care so inappropriate as to evidence intentional maltreatment, and that the Defendants' acts violated the

Due Process clause and the equal protection component of the Fifth Amendment in addition to the Eighth Amendment's prohibition against cruel and unusual punishment.

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1331(a). Plaintiff prayed for a total of $1,500,000 in actual damages, and $500,000 in punitive damages.

On January 10, 1977, the District Court, pursuant to motions filed by the defendants, dismissed the complaint for lack of subject matter jurisdiction. The court held that the plaintiff could not satisfy the $10.000 jurisdictional amount requirement of 28 U.S.C. §1331(a) because of the limitations on recoverable damages under the Indiana wrongful death and survival statutes. In dismissing the complaint, the District Court noted that these Indiana state statutes were the "sole mechanisms," Memorandum Entry of District Court, Petitioner's Appendix D, p. 26a, by which Mrs. Green, as the sole representative of her son's estate, could maintain an action for damages.

The trial court recognized that an action for damages may be brought for a violation of a right guaranteed by the Constitution. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The trial court further recognized that under the authority of Estelle v. Gamble, 429 U.S. 9 (1976), Joseph Jones, Jr., could have maintained this Bivens-type action had he survived the alleged wrongs. However, because survival of Jones' federal claim, in the view of the District Court, was governed by state law, the District Court felt compelled to dismiss the complaint.

The Seventh Circuit Court of Appeals reversed, in all parts relevant to this Petition, the decision of the District Court. The court agreed with the District Court that the Respondent had alleged sufficiently a Bivens-type right of action arising directly under the Eighth Amendment. Further, the court found that the jurisdictional amount requirement of

28 U.S.C. §1331(a) was satisfied because it refused to apply the Indiana survival statute to this case. The court concluded that "whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." Green v. Carlson, 581 F2d 669, 675 (7th Cir. 1978). (Emphasis supplied.)

On November 24, 1978, the Seventh Circuit Court of Appeals, on consideration of the petition for rehearing and suggestion for rehearing en banc filed by the Petitioners, and after ordering the Respondent to file an answer to said Petition, denied the Petition for rehearing in all respects. (Petitioners' Appendix C, p. 20a).

REASONS FOR DENYING THE WRIT

The questions presented by the petitioners on review are wholly insufficient to warrant plenary review when judged by the standards established in Supreme Court Rule 19. See American Construction Co. v. Jacksonville Railway, 148 U.S. 371, 384 (1893). No conflict with any decision of this Court or any other Court of Appeals is present.

I. THE RESPONDENT'S COMPLAINT STATES A CLAIM FOR RELIEF UNDER THE CONSTITUTION AGAINST THE INDIVIDUAL DEFENDANTS, NOTWITHSTANDING THE AVAILABLITY OF A CLAIM AGAINST THE UNITED STATES UNDER THE FEDERAL TORTS CLAIM ACT.

The Petitioners frame the issue in a very narrow fashion. Based on their reading of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), they would have this Court reverse the thoughtful and considered opinion of the Seventh Circuit Court of Appeals because of their contention that the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq., provides an adequate remedy for Respondent here, such as to totally preclude a remedy under the Eighth Amendment of the United States Constitution.

This argument demonstrates a fundamental misunderstanding of the Federal Tort Claims Act. It also ignores the intent of Congress when it amended the Act in 1974. Finally, the Petitioners fail to take cognizance of this Court's decision in Estelle v. Gamble. 429 U.S. 97 (1976).

A. A CLAIM IS STATED UNDER THE EIGHTH AMENDMENT FOR MEDICAL TREATMENT SO INADEQUATE AS TO AMOUNT TO A REFUSAL TO PROVIDE ESSENTIAL MEDICAL CARE.

Both the Southern District of Indiana and the Seventh Circuit recognize what the Petitioner chooses to ignore. The Constitution mandates a standard of care for prisoners, whether they be state or federal. In Estelle v. Gamble, 429 U.S. 97 (1976), this Court concluded, based on a thorough discussion of the Eighth and Fourteenth Amendments, that,

> ...deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," Gregg v. Georgia, supra at , proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoners' needs or by prison guards in intentionally interfering with the treatment once prescribed.

429 U.S. 104-105. As the Seventh Circuit recognized below, in deciding whether dismissal by the trial court of the Respondent's claim was proper, given the criteria delineated in Estelle, "The alleged conduct of the federal defendants

rises to the level of constitutional violations." Green v. Carlson . 581 F2d 669, 675 (7th Cir. 1978).

This conclusion is compelled by Bivens, supra, which recognized the existence of a substantive federal claim based directly on the Fourth Amendment and held that, despite the absence of any statute conferring such a right, the courts have the inherent power to create a damage remedy for injuries suffered at the hands of federal officials for violation of that right. In addition to Estelle, supra, the overwhelming majority of courts which have considered the issue have held that a cause of action for damages can be maintained directly under the Constitution. Green v. Carlson, supra; Loe v. Armstead, 582 F2d 1291 (4th Cir. 1978); Beard v. Robinson, 563 F2d 331 (7th Cir. 1977); Briggs v. Goodwin, 569 F2d 10 (D.C. Cir. 1977); Jacobson v. Tahoe Regional Planning Agency, 566 F2d 1353 (9th Cir. 1977); Paton v. LaPrade, 524 F2d 862 (3rd Cir. 1975); Wounded Knee Legal Defense/Defense Committee v. FBI, 507 F 2d 1281 (8th Cir. 1974).*

The failure of the Petitioners to discuss Estelle and its progeny is both inexcusable and understandable. Recognition of the import of Estelle would leave the Petitioners with no supposed conflict in the case law, a ground upon which they urge this Honorable Court to grant certiorari. In fact, the Petitioners can point to no cases that approach the factual context of this case which differ with the conclusion reached by the Seventh Circuit in this case.

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*Although Bivens, supra, on its facts related only to an alleged Fourth Amendment violation, any doubt as to whether the Bivens rationale extends to alleged violations of other Amendments was impliedly disposed by this Court in City of Kenosha v. Bruno, 412 U.S. 507 (1973). In Bruno, the plaintiff asserted a claim directly under the Fourteenth Amendment. This Court, in remanding the case, indicated that a cause of action would be available under the Fourteenth Amendment, if the plaintiff could properly allege the requisite jurisdictional amount under 28 U.S.C. §1331(a).

B. THE FEDERAL TORT CLAIMS ACT IS A SUPPLEMENTAL REMEDY TO RESPONDENT'S BIVENS-TYPE REMEDY FOR THE CONSTITUTIONAL DEPRIVATIONS ALLEGED IN THE COMPLAINT.

The Petitioners argue that Bivens mandates the result they urge upon this Honorable Court. Nothing could be further from the truth. It is true, as the Petitioners note, that this Court indicated in Bivens that the existence of "another (federal) remedy, equally effective in the view of Congress," id. at 397, might be one factor militating against the implication of a constitutional damages action. It is not true, indeed it is ludicrous to suggest, that the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq., should supplant the Constitution as Joseph Jones, Jr.'s only remedy, through his estate, for his death. A brief examination of this Act and its recent amendment demonstrates the inadequacy of the Act as a remedy for constitutional violations.

The Act adopts as a choice of law rule "the law of the place where the act or omission occurred." 28 U.S.C. §2672, thus defeating the goal of uniformity of treatment of federal officials. Garber v. United States, 578 F 2d 414 (D.C.Cir. 1978); Bowen v. United States, 570 F 2d 1311 (7th Cir. 1978). As Judge Swygert indicated in Green, "(t)he liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred." Id. at 675.

Under the Federal Tort Claims Act the federal government is not liable for punitive damages. 28 U.S.C. §2674. This is contrary to the rule which now prevails in the federal courts in civil rights, and by analogy, Bivens-type actions. Basista v. Weir, 340 F 2d 74 (3rd Cir. 1965). This rule would also defeat an important part of the claimed relief in the instant case.

More importantly, the Act is designed to merely waive the sovereign immunity of the federal government for the tortious conduct of its employees in certain specified situations. It is not designed as a remedy to supplant the Respondent's constitutional remedy as Petitioners suggest. As one court has said, "(t)he Tort Claims Act by its terms applies only when the action is against the United States." Turner v. Ralston, 409 F Supp 1260, 1261 (W.D.Wisc 1976). In fact, "(u)nless recovery is had from the United States or the liability arises from an automobile accident, . . ."the. . . Act does not touch the liability of the (federal) employees . . . ." United States v. Gilman, 347 U.S. 507, 509 (1954) (citations omitted)." Id. at 1261.

The amendment to the Act in 1974, does not, at the Petitioners suggest, make the Act a more adequate remedy such that an aggreived victim should be denied his/her constitutional claim. The amendments in 1974 were, without doubt, a response to Bivens. The intent of Congress was not, however, to narrow the possible remedies of someone in Webster Bivens shoes, but rather to expand the possible choice of remedies. The intent of Congress was to supplement an aggreived individuals right of action against an individual federal employee with a right of action against the United States in certain circumstances. 28 U.S.C.§2680(h). Even a cursory examination, which Petitioner evidently failed to do, reveals Congress' intent to supplement an action against the individual wrongdoer with one against the government.

> ...this provision should be viewed as a counterpart to the Bivens case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct. That is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved).

S. Rep. No. 93-588, 93rd Cong. 2d Sess. reprinted in [1974] U.S. Code Cong & Admin News, p. 2791. (Emphasis supplied.)

Thus, the only fair reading of the 1974 amendments to the Fed-

eral Torts Claims Act suggests that it was meant to avoid occasions where a judgment becomes worthless because the individual federal employee lacks the funds to satisfy it. Norton v. United States, 581 F2d 390 (4th Cir. 1978)

The Petitioners suggest, at pp. 10-14 of their brief, a number of other cases which are supposedly in conflict with Green. A closer examination reveals this to be a fiction.

In Brown v. General Services Administration, 425 U.S. 820 (1976), the Petitioner was precluded from a non-Title VII remedy, and thus faced dismissal, because the Court found that, "...the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination," id. at 829, where no effective judicial remedy existed prior thereto. Can it be said the same is true in the instant case. Has Congress, through the Federal Tort Claims Act amendment of 1974, which was attached as a rider to a reorganizational bill, provided an "exclusive" and "pre-emptive" remedy in the fight to eradicate unconstitutional misconduct by federal officials? The Respondent respectfully urges that it has not. Rather, Congress has simply engaged in a waiver of sovereign immunity as to certain tort claims.

The other cases, aside from two lower court opinions from the Southern District of New York, cited by the Petitioners involve a fact situation not present in the instant case. Molina v. Richardson, 578 F2d 846 (9th Cir. 1978); Richardson v. Wiley, 569 F2d 140 (D.C. Cir. 1977), and Mahone v. Waddle, 564 F2d 1018 (3rd Cir. 1977), all involved situations where the courts attempted to keep the law in Bivens -type actions coextensive with that developed under the Civil Rights Acts. As the Court indicated in Green,

> because actions brought under the Civil Rights Act and those of the Bivens-type are conceptually identical and further the same politices, courts have frequently looked to the Civil Rights Act and their decisional gloss for guidance in filling the gaps left open in Bivens-type actions.

Id at 673. (Citations omitted.)

As the Petitioner note in their brief, at page 14, Davis v. Passman, 571 F2d 793 (5th Cir. 1978), does not present the question which this case involves. To this the Respondent would agree. Even, assuming, arguendo, that Davis is applicable it is distinguishable because of the special relationship that exists, by statute, between a member of Congress and a member of his/her staff. This relationship,

> is a matter peculiarly within the concerns of the legislative branch and...special factors therefore counsel against implication of a Bivens type remedy. Indicative of this special relationship is 2 U.S.C. §92, which makes members of a congressman's personal staff removable at any time with or without cause. Furthermore, the amendments to Title VII...did not protect persons in non-competitive federal positions such as congressional staff members.

Loe v. Armistead, 582 F2d 1291, , N. 2 (4th Cir. 1978).

In sum, the Petitioners can cite to no authority of this Court or the Circuit Courts of Appeal which conflicts with the opinion of the Seventh Circuit in Green. For the above reasons, the Respondent respectfully requests of this Honorable Court that, as to the first question presented for review, the Petition for a Writ of Certiorari be denied.

II. WHERE APPLICATION OF THE INDIANA SURVIVAL STATUTE WOULD ABATE THIS BIVENS-TYPE ACTION AGAINST THESE DEFENDANTS, WHOSE CONDUCT RESULTED IN THE DEATH OF JOSEPH JONES, THE FEDERAL COMMON LAW MANDATES SURVIVAL OF THE ACTION.

The second question presented for review concerns whether, assuming the Eighth Amendment creates a right of action against the Petitioners, survival of that action is governed by federal common law or the law of the state where the injury occurs. Having raised the issue, the Petitioners fail to indicate why this Honorable Court should review the decision of the Seventh Circuit. All the Petitioners assert is that "...this Court should review that decision," (Petitioners' Brief, p. 17), because they disagree with the Seventh Circuit's treatment of Robertson v. Wegmann, 436 U.S. 584 (1978). No conflict among the Circuits, or indeed in the lower federal courts, is indicated by the Petitioners.

The Respondent asserts that the decision of the Court in Green is fully supported by this Court's decision in Robertson. As a preliminary matter it must be pointed out that Robertson has no binding effect on the resolution of the issues in this case. The plaintiff here is suing directly under the Constitution, a Bivens-type action, and not under the Civil Rights Acts, 42 U.S.C. §1981 et seq. Thus, 42 U.S.C. §1988, which directs the federal courts to ulitize state laws to the extent that they are not consistent with "the Constitution and laws of the United States", has no statutory effect. The Seventh Circuit expressly notes this. Green v. Carlson, 581 F2d 669, 673 (7th Cir. 1978).

Nonetheless, the Court "looked to the Civil Rights Acts and their decisional gloss for guidance in filling the gaps left open in Bivens-type actions." Id. The Court's application of this analogous law carefully evaluated the impact of Robertson in reaching its conclusion. This conclusion is fully supported by the different factual situations and policy considerations presented in Green and Robertson.

The primary difference, of course, is that Green presents a question expressly reserved by the Supreme Court in Robertson.

> Unlike Shaw, Jones, Jr. is alleged to have died as a result of the deprivation of his civil rights. In Robertson the Court expressly intimated no view about whether abatement based on state law would be allowed in that situation.

Green, at 674.

Where, as in the instant case, death is caused by the very conduct complained of, the federal policies of deterrence, which as the Court noted in Green underlie §1983 and by analogy Bivens-type actions, would be thwarted by abatement. As the Court notes, it is this concern, "prevention of abuse of power by officials, which distinguishes this case from Robertson." Id. at 673-674.

The Petitioners assert in their Petition, at n.14, pp. 14-15, that ",,,the Indiana statute is more generous than the Louisiana provision approved by this Court..." in Robertson. In fact, the opposite is true. The state law of survival in Robertson was more hospitable, more consistent with the nature of federal right being protected. The claim of Marie Green in this case would have survived had it been brought in Louisiana.* The proper reading of the Indiana survival statute, Ind.Ann. Stat., §34-1-1-1, is that all cause of actions for personal injuries to a deceased party survive only when that person... thereafter dies from causes other than said personal injuries so received." (Emphasis supplied.) If this statute is held controlling, it would not merely limit the amount of recovery, it would abate the action entirely. Judge Swygert, unlike the Petitioners here, understood the sinister implications of applying the Indiana Survival Act to this type of action.

> Joseph Jones, Jr. died allegedly as a result of the personal injuries caused

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*"In actions other than those for damage to property, however, Louisiana does not allow the deceased's personal representative to be substituted as plaintiff; rather, the action survives only in favor of a spouse, childre, parents, or siblings..." Robertson at 561-62 (emphasis supplied). 56 L.Ed. 2d

> by the alleged wrongdoing, and not from causes other than those personal injuries. Thus the only cause for personal injury permitted to survive under Indiana law encompasses a factual situation different from that alleged in this case.

Green at 673, n. 8.

In fact, if the Indiana survival statute controls, there can never be a civil rights action or Bivens-type action brought in that state where death results from the conduct of government officials. As the Court correctly concluded, "(s)uch a holding would not only fail to effectuate the policy of allowing complete vindication of constitutional rights; it would subvert that policy." Green at 674.

The need for uniformity in fashioning survival rules in Bivens-type actions is of greater import in Green than Robertson. At bottom here is a recognition that this case presents a purely federal situation. No "state officials" are implicated in the unconstitutional conduct complained of. In fact, the Petitioners fail to articulate any adverse impact on the state law or policy of Indiana which is implicated by disregarding the state statute on survival. Because this is a Bivens-type action, resort to 42 U.S.C. §1988 is not mandated. As this Court noted in Robertson,

> (W)hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which §1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.

Robertson, 56 LEd 2d at 563, n. 11.

The reverse is true here. Congress has not spoken on the question of statutory reliance on state law in Bivens-type actions. As Judge Swygert noted in Green, since 42 U.S.C. §1988, "has no statutory effect on Bivens-type actions, and we find that this is an area of law in which courts must be

free to develop federal common law, Robertson's rejection of the deniability of uniformity has no bearing on this case." Green at 674-75, n. 11.

Where a claim is asserted against federal officials, the need for uniform treatment of these claims is greater than in an analogous §1983 claim.

> As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in Beard the Illinois statute permitted survival of the Bivens action. The liability of federal agents should not depend upon where the violation occurred.

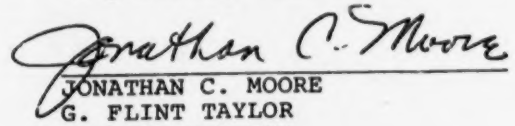
Green at 674-675.

If certiorari were to be granted in every case in which a circuit court of appeals has dared to interpret a decision of the Supreme Court, this Court would be inundated with a mountain of frivolous petitions. Distilled in its roughest form, however, this is the essence of the Petitioner's argument. As to the second question presented for review, the Petitioners seek review on non-reviewable grounds; they disagree with the result reached by the Seventh Circuit. Since the Petitioners have failed to demonstrate how Green conflicts with any decision of this Court or, for that matter, any decision of any lower federal court, the Respondent respectfully suggests that this writ of certiorari as to the second question presented for review should be denied.

III. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,



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No. 78-1261

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BRIEF FOR THE PETITIONERS

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INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Constitution, statutes, and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 581 F.2d 669. The opinion of the district court (Pet. App. 22a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on August 3, 1978. A timely petition for rehearing was denied on November 24, 1978 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on February 13, 1979, and was granted on June 18, 1979 (A. 29). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Eighth Amendment gives rise to an implied cause of action in circumstances in which the Federal Tort Claims Act provides an adequate federal remedy.

2. Whether, if the Eighth Amendment creates such a right, survival of that action is governed by federal common law rather than the state statutes that apply to analogous cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Eighth Amendment to the United States Constitution provides in relevant part:

> [C]ruel and unusual punishments [shall not be] inflicted.

3. 28 U.S.C. 1331(a) provides in relevant part:

> The district courts shall have original jurisdiction of all civil actions wherein the amount in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States * * *.

4. 28 U.S.C. 1346(b) provides in relevant part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

5. The Rules of Decision Act, 28 U.S.C. 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

6. 28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

7. Ind. Code Ann. § 34-1-1-1 (Burns 1973) provides:

> All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party, except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein. Any action contemplated in this section or in section 6 of this act may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Every such action shall be deemed to be a continued action, and therefore accrued to such representatives or successors at the time it would have accrued to the deceased if he had survived. If any such action is continued against the legal representatives or successors of the defendant, a notice shall be served on him as in the case of an original notice. If any action has been commenced against the decedent prior to his death, the same shall continue by substituting his personal representatives as in other actions surviving the defendant's death; in event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate. Provided, however, That when a person receives personal injuries caused by the wrongful act or omission of another and thereafter dies from causes other than said personal injuries so received, the personal representative of the person so injured may maintain an action against the wrongdoer to recover damages re-

> sulting from such injuries, if the person so injured might have maintained such action, had he or she lived; but Provided, further, That the personal representative of said injured person shall be permitted to recover only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death.

8. Ind. Code Ann. § 34-1-1-2 (Burns 1973) provides:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission. When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two [2] years, and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission. That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this act, inure to the exclusive benefit of the widow or widower, as the case may be, and to

the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages inure to the exclusive benefit of the person or persons furnishing necessary and reasonable hospitalization or hospital services in connection with the last illness or injury of the decedent, performing necessary and reasonable medical or surgical services in connection with the last illness or injury of the decedent, to the undertaker for the necessary and reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.

STATEMENT

Joseph Jones, Jr., died in the federal penitentiary at Terre Haute, Indiana, while serving 10 years' imprisonment for bank robbery. Respondent, as administratrix of her son's estate and next of kin, brought this suit seeking money damages. She al-

leged that her son's death was the result of deliberate indifference to his medical needs in violation of the Fifth and Eighth Amendments to the Constitution.

1. Respondent's complaint alleges the following events.[1] On his entry into the federal prison system in 1972, Jones was diagnosed as a chronic asthmatic. Jones arrived at the Terre Haute prison in July 1974. Between July 30 and August 6, 1975, Jones was hospitalized outside the prison for his asthmatic condition. At that time, the attending physician recommended that Jones be transferred to a prison in a better climate and also ordered certain medication and treatment. Jones remained in Terre Haute and did not receive the medication and treatment that had been prescribed (A. 9-10).

On August 14, 1975, Jones complained of another asthma attack and was admitted to the prison hospital. Jones remained there for eight hours, sporadically attended by petitioner William Walters, an unlicensed nurse in charge of the infirmary. Despite Jones' steadily worsening condition, no doctor examined him because none was on duty and none was called in.[2] After tending to his other duties, Walters attempted to treat Jones with a respirator that Walters had previously been told was not functioning properly. After Jones pulled away from the machine and complained that it was making his

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[1] In the current procedural posture of the case, we accept as true the factual allegations of the complaint.

[2] The complaint alleges that petitioner Dr. Benjamin DeGarcia, the chief medical officer of the prison, had failed to make any provisions for emergency medical service. (A. 10).

breathing worse, Walters gave Jones two injections of Thorazine, a drug contraindicated for treatment of asthma. About thirty minutes after the second injection, Jones suffered a respiratory arrest. Walters and petitioner Emmett Barry attempted to revive Jones by administering an electric jolt to him, but neither Walters nor Barry knew how to operate the emergency apparatus. Jones was then taken to the local hospital, where he was pronounced dead (A. 10-11).

2. On June 18, 1976, respondent filed this suit in the United States District Court for the Southern District of Indiana, claiming that the acts summarized above caused the death of her son and constituted gross and intentional medical maltreatment in violation of the Fifth and Eighth Amendments. The complaint named as defendants Norman A. Carlson, the Director of the Federal Bureau of Prisons; Robert T. Brutshe, the Assistant Surgeon General; various officials at the Terre Haute Penitentiary;[3] and the Joint Commission on the Accreditation of Hospitals.[4] Respondent alleged jurisdiction under 28 U.S.C. 1331 and sought $1,500,000 compensatory and $500,000 punitive damages and attorneys' fees (A. 8-9, 12-13).

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[3] The warden of the Terre Haute Penitentiary was never served with the complaint, and he is not a party to this case (Pet. App. 16a n.12). The other prison officers named in the suit were Dr. DeGarcia, Walters, and Barry.

[4] The Department of Justice does not represent the Joint Commission.

In January 1977 the district court dismissed the action on jurisdictional grounds.[5] The court first concluded that a damages action for constitutional violations is available under the rationale of this Court's decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and that respondent had alleged sufficiently a violation of her son's Eighth Amendment rights (Pet. App. 25a-26a). See *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The court held, however, that because under Indiana law respondent's recovery was limited to "reasonable hospital, medical and burial expenses, * * * it [was] apparent that [respondent] cannot 'in good faith' satisfy the [$10,000] jurisdictional amount requirement" of 28 U.S.C. 1331 (Pet. App. 27a).[6]

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[5] The court also found that three of the six federal defendants had been improperly served and therefore dismissed the action against them on this alternative ground (Pet. App. 23a-24a).

[6] The Indiana Civil Code provides that "[a]ll causes of action shall survive * * * except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein." Ind. Code Ann. § 34-1-1-1 (Burns 1973). Where the injured person "dies from causes other than said personal injuries so received," then the deceased's representative may recover "only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death." *Ibid.* If the injury causes the death of the wronged party the decedent's representative usually may recover unlimited damages. Ind. Code Ann. § 34-1-1-2 (Burns 1973). But where, as here, the decedent leaves no spouse or dependent children or kin, the representative may recover only medical, hospital, burial and administration expenses. *Ibid.* Jones had no wife, children or dependent kin, and his medical, hospital, and funeral expenses were paid by the federal government.

The court of appeals reversed in substantial part.[7] The court agreed with the district judge that respondent had alleged sufficiently a *Bivens*-type right of recovery arising under the Eighth Amendment. The court refused, however, to apply the Indiana survival and wrongful death provisions to this case. The court concluded that "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action" (Pet. App. 13a). The court recognized that the Indiana rule would not thwart any interest of Jones, but it concluded that application of the state statute would "subvert" the "policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure" (*id.* at 12a).

SUMMARY OF ARGUMENT

I

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that a victim of official conduct in violation of the Fourth Amendment had a right to recover damages in federal court despite the absence of any statute creating such a cause of action. The Court did not conclude, however, that

[7] The court of appeals affirmed the dismissal of this action with regard to one of the federal defendants whom respondent had failed to serve at all (Pet. App. 16a n.12). See note 3, *supra*. However, the court reversed the dismissal of two other federal defendants, holding that service upon them by certified mail was proper under Fed. R. Civ. P. 4(e) and (f) and Ind. Code Ann., Trial Rule 4.4 (Pet. App. 15a-16a).

implication of a constitutional damages action was always appropriate. Rather, the Court strongly suggested that recognition of a *Bivens*-type remedy was inappropriate in circumstances in which Congress had taken affirmative action to supply another remedy. See *id.* at 396-397. As Mr. Justice Harlan's concurring opinion succinctly summarized, "[t]he question then, is * * * whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the [constitutional] interest asserted." *Id.* at 407.

The Court's subsequent decisions have confirmed that the rationale in *Bivens* does not apply where Congress itself has created an appropriate remedy. For example, in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), the Court found that Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, constituted a federal employee's exclusive remedy for employment discrimination and that government personnel therefore could not seek relief in a *Bivens*-type action. And just last Term, in addressing the scope and application of constitutional damages actions, the Court observed: "[O]f course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 19. Accordingly, the lower courts have repeatedly refused to extend *Bivens* where a federal statute provides relief for a particular kind of constitutional violation.

We submit that the comprehensive administrative and judicial procedures provided by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671

et seq., constitute an adequate federal remedy for the kind of constitutional violation that was alleged to have occurred in this case. The FTCA imposes liability on the United States for many of the torts committed by federal employees acting within the scope of their official duties. In particular, it is well established that the FTCA covers claims of improper medical treatment of prisoners such as those made by respondent. In fact, since most medical malpractice in the prison context does not rise to the level of an Eighth Amendment violation (see *Estelle* v. *Gamble*, 429 U.S. 97, 105-106 (1976)), the FTCA is a more extensive remedy for this type of complaint than a *Bivens*-type suit. Moreover, the FTCA remedy is ordinarily a preferable remedy because the defendant is the government rather than individual employees who are likely to be judgment proof.

Thus, extension of *Bivens* in this case is unwarranted. The FTCA, which represents the considered judgment of Congress in this area, is a complete and sufficient compensatory mechanism. Judicial recognition of another, redundant remedy seemingly violates basic principles of constitutional adjudication and separation of powers. Moreover, implication of a constitutional damages action is especially inappropriate in this case because it would allow a litigant to "avoid * * * all of th[e] detailed and specific provisions of the [FTCA] * * * [and to] bypass the administrative process, which plays such a crucial role in the scheme established by Congress * * *." *Great American Federal Savings & Loan Ass'n* v. *Novotny*, No. 78-753 (June 11, 1979), slip op. 9.

Considerations of public policy also strongly militate against expanding the scope of implied constitutional damages actions to encompass circumstances such as those presented here. As compared to a *Bivens*-type suit, the FTCA is most often a far better remedy for the victims of unlawful governmental conduct in terms of ease of proof and both certainty and speed of relief. Furthermore, suits under the FTCA do not chill vigorous official action. Assessing liability directly against the government (which in most cases ought to bear the financial burden) is more likely to prompt adoption of curative measures thereby deterring future violations, especially for the kind of systemic failure alleged in this case. Concomitantly, because of the FTCA's mandatory administrative claim procedures, remitting would-be plaintiffs to their remedies under the FTCA will keep the overwhelming majority of cases from ever reaching the federal courts. See, *e.g.*, S. Rep. No. 1327, 89th Cong., 2d Sess. 2-4 (1966).

II

If the Court nonetheless concludes that respondent may sue directly under the Eighth Amendment, it must then fashion a rule of survival for *Bivens*-type suits. In accordance with the Rules of Decision Act, 28 U.S.C. 1652, and for reasons of convenience and judicial limitations, the federal courts routinely adopt pertinent state law to fill the procedural gaps often found in federal law. For example, since 1830, this Court has consistently held that, in the absence of contrary congressional directive, state statutes gov-

ern the period of limitations for federal causes of action unless application of that state law would wholly frustrate the federal scheme. This approach is particularly appropriate with regard to survivorship and wrongful death statutes which typically represent a legislative alteration of common law rules and implicate the state interests underlying estate and domestic relations law.

In *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), this Court held that state survival laws ordinarily control civil rights actions brought against state officials under 42 U.S.C. 1983. In concluding that the Louisiana survival law abated the constitutional damages action in that case, the Court observed that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." 436 U.S. at 593. Nonetheless, *Robertson* is not dispositive of this case because the Court indicated that where the state law was generally hostile to survival of constitutional tort suits or where the official misconduct caused the death of the victim, application of state law might be inappropriate. 436 U.S. at 594. In our view, neither of these considerations warrants judicial legislation of a federal common law of survivorship in this case.

Under Indiana law (and unlike the Louisiana law applied in *Robertson*), all causes of action survive. To be sure, Indiana restricts the kinds of recoverable damages where, as here, the decedent is not survived by a spouse or any dependent relative. (In fact, in the unique circumstances of this case, respondent cannot satisfy the $10,000 jurisdictional amount set forth in 28 U.S.C. 1331.) But, as evidenced by the many similar state and federal statutes, this decision to limit windfall recoveries is not unreasonable. Nor can it fairly be contended that application of Indiana survival law frustrates the policy of deterrence underlying implication of a constitutional damages action. The availability of full compensation in most instances acts as a formidable deterrent factor. See *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978). And it is too far-fetched to assume that the institutional breakdown in the prison medical system that is alleged to have occurred here was predicated on the intricacies of Indiana survivorship law. In sum, the court of appeals should have applied the local survival statute as the governing law rather than creating a free-wheeling federal rule of survival in favor of respondent.

ARGUMENT

I

IMPLIED CONSTITUTIONAL CAUSES OF ACTION FOR DAMAGES ARE INAPPROPRIATE IN CIRCUMSTANCES IN WHICH THE FEDERAL TORT CLAIMS ACT CONSTITUTES AN ADEQUATE FEDERAL REMEDY FOR IMPROPER OFFICIAL CONDUCT

A federal official's unconstitutional conduct may give rise to a suit for damages implied directly under the Constitution. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). But this Court has never indicated that such a constitutional damages action is always appropriate whenever an agent of the federal government violates a person's constitutional rights. To the contrary, as we discuss below,

Bivens itself was premised on the absence of any other remedy to redress the kind of constitutional wrongs there at issue. The Court's analysis in *Bivens* and subsequent cases demonstrates that where Congress has provided a comprehensive remedy to recompense the victims of unlawful governmental action, extension of *Bivens* is unwarranted. See Dellinger, *Of Rights and Remedies: The Constitution As A Sword*, 85 HARV. L. REV. 1532, 1549-1551 (1972); Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1153 (1969). Because the Federal Tort Claims Act ("FTCA") provides a federal statutory remedy for Eighth Amendment violations such as those alleged by respondent,[8] the court of appeals erroneously recognized a constitutional damages action in this case.[9]

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[8] The Court has never sustained a constitutional claim for damages based on the Eighth Amendment. The government does not contend, however, that violation of the Eighth Amendment can never give rise to an implied cause of action. See *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 13-14. We further note that respondent asserted in her complaint that the actions of the various prison authorities also violated the Fifth Amendment (A. 12).

[9] Although the government contended in the court of appeals that recognition of an implied constitutional damages action was inappropriate in this case, we did not raise below the precise issue briefed in point I. Nevertheless, the Court has discretion to consider this issue on the merits (see, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)), and we submit that the Court should exercise that discretion in the particular circumstances of this case. First, the issue that the government erroneously believed had been raised in the court of appeals was actually submitted to the Fourth Circuit in a case that is being held pending resolution of this case. See *Moffitt* v. *Loe*, No. 78-1260. Moreover, the second issue posed by this case, which is independently worthy of plenary review by this Court, was presented to and considered by the court of appeals. Thus a decision not to address point I in this case would not serve the ends of judicial administration, because the Court in all likelihood would consider the second issue presented here and would also grant the government's petition in *Loe* to consider the issue fully briefed here as point I. Finally, although the issue discussed in point I was squarely raised as the first question presented in the government's petition for a writ of certiorari, respondent's brief in opposition to the government's petition did not object to Court's consideration of this issue on procedural grounds but instead comprehensively addressed the substance of the government's claim.

A. The *Bivens* Line Of Cases Does Not Encompass Circumstances In Which Congress Has Provided An Adequate Remedy

1. In *Bivens*, this Court established that persons whose Fourth Amendment rights have been violated by federal agents may bring an action in federal court to recover damages caused by such unconstitutional conduct. The Court first concluded that the Fourth Amendment constitutes an independent limitation on the exercise of federal power regardless of state law. 403 U.S. at 392-394. The Court then rejected the contention that the victims of unlawful searches and seizures should be remitted to their remedies under state law because "[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." *Id.* at 394. Finally, the Court noted (*id.* at 395) that "[h]istorically, damages have been regarded as

the ordinary remedy for an invasion of personal interests in liberty," and that there was no occasion to depart from that rule since "[t]he present case involved no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.[10]

Bivens thus explicitly recognized that judicial recognition of a compensatory remedy for Fourth Amendment violations is not compelled by the Constitution. Rather, implication of a constitutional damages action was appropriate in *Bivens* because state law did not provide an adequate remedy for the class of people in Bivens' circumstances and because Congress had neither indicated its intent to preclude such relief nor provided an alternative means of redressing official wrongs. Where, however, there is "another remedy, equally effective in the view of Congress," the Court strongly suggested that the judiciary ought to refrain from formulating an additional cause of action based directly on the Constitution. 403 U.S. at 397. See Lehmann, *Bivens And Its Progeny: The Scope Of A Constitutional Cause Of Action For Torts Committed By Government Officials*, 4 Hast. Const. L. Q. 531, 578-579 (1977).

This analysis was further explicated in Mr. Justice Harlan's concurring opinion. After noting that the injuries suffered by Bivens were "of the sort that, if proved, would be properly compensable in damages"

[10] The Court had previously held that federal jurisdiction for such an action existed under 28 U.S.C. 1331. See *Bell* v. *Hood*, 327 U.S. 678 (1946). See also *Bivens*, *supra*, 403 U.S. at 396; *id.* at 398 (Harlan, J., concurring).

(403 U.S. at 408),[11] Mr. Justice Harlan stated (*id.* at 409-410; emphasis supplied):

> [I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. *However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.* Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.[12]

2. On several subsequent occasions, the Court has confirmed that the result in *Bivens* was not constitu-

[11] We do not contend that the alleged injuries suffered by respondent's son are not "properly compensable in damages." We note, however, that Mr. Justice Harlan's focus on the type of injury involved has been adopted by the Court as another factor to be considered in determining whether to imply a constitutional cause of action for damages. See, *e.g.*, *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 16; *Carey* v. *Piphus*, 435 U.S. 247, 255-259 (1978).

[12] The Chief Justice, Mr. Justice Black, and Mr. Justice Blackmun filed separate dissenting opinions, indicating that the Court was improperly legislating a cause of action. See 403 U.S. at 411-412, 427-430. The Chief Justice further suggested that Congress should create an effective administrative remedy "as it did for example in 1946 in the Federal Tort Claims Act" as a substitute for the judicially created remedies for Fourth Amendment violations (*i.e.*, the exclusionary rule and presumably *Bivens* itself). *Id.* at 421. Congress did subsequently amend the FTCA to encompass unlawful searches and seizures. See Pub. L. No. 93-253, Section 2, 88 Stat. 50, codified at 28 U.S.C. 2680(h). See discussion at pages 31-34, *infra*.

tionally compelled and that extension of the *Bivens* holding is inappropriate where a plaintiff may redress his constitutional injuries under existing federal statutes. For example, in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), the plaintiff sued his federal employer and supervisors for alleged race discrimination in violation of various federal statutes as well as the Constitution. *Id.* at 822-824. The Court concluded that the "careful blend of administrative and judicial enforcement powers" contained in Section 717 of Title VII, 42 U.S.C. 2000e-16, was plaintiff's exclusive remedy. 425 U.S. at 833. Although the Court did not separately address plaintiff's constitutional claim, the Court's holding squarely refutes the contention that the victim of unconstitutional conduct has a right to sue the individual officials involved regardless of the existence of alternative federal remedies. In addition, the Court's analysis in *Brown* strongly supports our submission that *Bivens* should not be interpreted to permit circumvention of a "careful and thorough remedial scheme" established by Congress (425 U.S. at 833). See discussion at pages 29-31, *infra*.[13]

[13] Because the primary issue in *Brown* was whether the plaintiff could resort to other federal statutes arguably applicable to his claims, much of the discussion in *Brown* concerns whether Congress specifically intended to make Section 717 an exclusive remedy. In holding that Section 717 extinguished recourse to well-established statutory remedies, the Court properly searched for evidence of clear legislative command. See also 425 U.S. at 839 (Stevens, J., dissenting). On the other hand, the question posed here is whether the courts should recognize an implied constitutional cause of action in the absence of congressional authorization and despite the existence of a federal statutory remedy. In our view, that decision depends at least in part on jurisprudential considerations wholly separate from whether Congress intended the FTCA to be the only remedy for victims of constitutional torts.

That the rationale of *Bivens* does not embrace situations that are covered by adequate federal remedies is further evidenced by the Court's opinions in *Butz* v. *Economou*, 438 U.S. 478 (1978). In that case, the federal officials contended in part that they, unlike their state counterparts, were entitled to absolute immunity concerning their discretionary acts, because Congress had never subjected federal officials to a statutory remedy equivalent to 42 U.S.C. 1983. Although the Court rejected this argument, it observed that "[t]he presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution." 438 U.S. at 503. Moreover, the four dissenting Justices in *Butz* specifically indicated that where Congress had amended the FTCA to allow direct actions against the government for damages caused by unconstitutional official conduct, it would be inappropriate to permit suits against the individual officers. *Id.* at 524-525.[14]

[14] Mr. Justice Rehnquist's dissenting opinion, which was joined by the Chief Justice, Mr. Justice Stewart, and Mr. Justice Stevens, stated that the 1974 amendment to the FTCA, which was intended to cover unlawful searches and seizures by federal agents, "permits a direct action against the Government, while limiting those risks which might 'dampen the ardor of all but the most resolute, or the most irresponsible,

Just last Term, in *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), the Court again addressed the scope and application of the *Bivens* decision. *Davis* arose out of a congressman's decision to discharge a female aide purportedly because of her gender. The aide, seeking damages for the allegedly discriminatory firing, based her suit directly on the Fifth Amendment. The Court concluded that she had alleged a constitutional cause of action and that damages were appropriate because "there are 'no special factors counselling hesitation in the absence of affirmative action by Congress.'" Slip op. 16 (quoting *Bivens*, *supra*, 403 U.S. at 396). The Court specifically stated, however, that "of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." Slip op. 19.

3. To summarize, the Court has thus unequivocally established that recognition of a constitutional damages action like that sustained in *Bivens* is a matter of principled discretion rather than constitutional compulsion. *Davis* v. *Passman*, *supra*, slip op. 1 (Powell, J., dissenting). See, *e.g.*, *Bivens*, *supra*, 403 U.S. at 396-397; *Brown* v. *General Services Administration*, *supra*; *Davis* v. *Passman*, *supra*, slip op. 16, 19.[15] Therefore, whenever Congress has

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in the unflinching discharge of their duties.'" 438 U.S. at 525 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)). Implicit in that observation is the thought that the existence of a direct remedy against the government precludes the assessment of liability against the individual officers.

[15] In Professor Monaghan's terminology, *Bivens* is a decision involving the "constitutional common law" and not an interpretation of the Constitution itself, and it is therefore

enacted an adequate remedy for a particular kind of unlawful official conduct, the courts should be chary of endorsing an additional remedy derived from the Constitution in that class of cases.[16] And extension of *Bivens* is especially unwarranted if implication of the constitutional damages action would allow "the com-

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readily subject to case by case application, revision, and modification. See Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 23-24 (1975). See also Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969) ("the fact that a constitutional remedy has been judicially prescribed in the absence of legislation does not mean that the legislature lacks power to prescribe an adequate substitute"); Katz, *The Jurisprudence of Remedies: Constitutional Legality And The Law of Torts In Bell* v. *Hood*, 117 U. Pa. L. Rev. 1, 5 (1968) ("Congress can, of course, replace remedies against federal officers by allowing suit against the government").

[16] As Mr. Justice Frankfurter explained in an analogous context, "[w]hen there is such a * * * remedy [against the sovereign] the suit against the officer is barred, not because he enjoys the immunity of the sovereign but because the sovereign can constitutionally change the traditional rules of liability for the tort of the agent by providing a fair substitute." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 722 (1949) (dissenting opinion).

Accord, *Bush* v. *Lucas*, 598 F.2d 958, 961 (5th Cir. 1979) (no *Bivens* action where Civil Service remedies available); *Turpin* v. *Mailet*, 591 F.2d 426 (2d Cir. 1979) (en banc) (withdrawing prior decision (579 F.2d 152) extending *Bivens* in light of intervening Supreme Court decision establishing alternative statutory remedy); *Molina* v. *Richardson*, 578 F.2d 846, 850-853 (9th Cir. 1978) (*Bivens* rationale not applicable in light of existing remedy under 42 U.S.C. 1983); *Richardson* v. *Wiley*, 569 F.2d 140 (D.C. Cir. 1977) (Title VII preempts *Bivens*-type remedy); *Mahone* v. *Waddle*, 564 F.2d 1018, 1024-1025 (3d Cir. 1977)) (existence of 42 U.S.C. 1981 militates against extension of *Bivens*): *Torres* v. *Taylor*, 456 F. Supp. 951 (S.D. N.Y. 1978) (FTCA remedy precludes *Bivens* suit). Cf. *Brice* v. *Day*, No. 77-2083 (10th Cir. Aug.

plainant [to] completely bypass the administrative process" otherwise mandated by Congress. *Great American Federal Savings & Loan Ass'n* v. *Novotny*, No. 78-753 (June 11, 1979), slip op. 9. See *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 831-833.

It remains only to consider the nature of the remedy provided by the FTCA for a deprivation of a prisoner's Eighth Amendment rights such as that allegedly suffered by respondent's son. We now turn to that question.

B. The Comprehensive Administrative And Judicial Remedies Contained In The FTCA Strongly Militate Against Extension Of *Bivens* In This Case

1. Prior to the passage of the Federal Tort Claims Act in 1946,[17] most persons who were injured as the result of a government employee's tortious conduct had no recourse against the federal government except through the clumsy and adventitious mechanism of introducing private bills in Congress. See S. Rep. No. 1400, 79th Cong., 2d Sess. 7, 29-34 (1946); H.R. Rep. No. 1287, 79th Cong., 1st Sess. (1945).[18] To

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27, 1979). Contra, *Hernandez* v. *Lattimore*, No. 78-2098 (2d Cir. June 7, 1979), slip op. 2896-2898.

See also *Loe* v. *Armistead*, 582 F.2d 1291 (4th Cir. 1978), cert. pending *sub nom. Moffitt* v. *Loe*, No. 78-1260.

[17] The FTCA was originally enacted as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 842-847.

[18] Since 1920, victims of maritime torts had a statutory remedy against the government. See Act of March 9, 1920, ch. 95, Section 2, 41 Stat. 525, 46 U.S.C. 742.

alleviate this hardship and to eliminate the burden of processing private bills, Congress enacted the FTCA, thus rendering the United States liable in many instances for the torts of its agents.[19] Since the FTCA has its origins in the doctrine of respondeat superior,[20] the employee must, of course, be acting in the scope of his duties. See 28 U.S.C. 2675(a). But if the agent's official conduct would render a private person liable "in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 2672, 2674, 2675), then recovery may be had against the United States except as provided in 28 U.S.C. 2680. However, in no circumstance may punitive damages or prejudgment interest be assessed against the United States. 28 U.S.C. 2674.[21]

The FTCA requires that a claimant first submit his claim to the appropriate agency within two years after such claim accrues. 28 U.S.C. 2401(b), 2675(a).[22] Thereafter, the agency head or his designee is empowered to investigate and to settle any claim fall-

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[19] The FTCA imposes liability on the United States for the wrongful acts of its employees. An award of damages may not be predicated on strict liability. See *Dalehite* v. *United States*, 346 U.S. 15, 44-45 (1953); *Laird* v. *Nelms*, 406 U.S. 797 (1972).

[20] See *Laird* v. *Nelms*, *supra*, 406 U.S. at 801.

[21] In those states where only punitive damages are available for wrongful death, the United States is liable instead for actual or compensatory damages. See 28 U.S.C. 2674.

[22] The issue of when a claim of medical malpractice accrues under the FTCA is currently before the Court in *United States* v. *Kubrick*, cert. granted, No. 78-1014 (Feb. 21, 1979).

ing under the FTCA. 28 U.S.C. 2675.[23] If the agency denies the claim in writing or fails to settle the claim within six months, the claimant may then file suit in the district court. 28 U.S.C. 2675(a), 1346(b). The amount of the suit may not exceed the amount of the claim submitted to the agency (28 U.S.C. 2675(b)), and the suit must be filed within six months of the denial of the administrative claim. 28 U.S.C. 2401 (b); S. Rep. No. 1327, 89th Cong., 2d Sess. 1 (1966). A judgment in a case falling under the FTCA constitutes a bar to suit by the claimant against the individual employee. 28 U.S.C. 2676.[24] The FTCA also ensures that the victims of unlawful official conduct will be the primary beneficiaries of the waiver of sovereign immunity by strictly limiting the amount of attorneys' fees that may be extracted from a settlement or a judgment under the FTCA. See 28 U.S.C. 2678.

[23] If the amount of the settlement exceeds $25,000, the agency must obtain prior written approval from the Attorney General or his designee. As originally enacted, the FTCA permitted administrative settlements for up to $1,000. Any claimant seeking more than that amount had to file suit. Ch. 753, Sections 403(a), 410, 60 Stat. 843-844. Congress soon realized that the $1,000 limit prompted the filing of unnecessary suits, thereby needlessly taxing the resources of the Department of Justice and the courts and delaying the settlement of bona fide claims. In order to relieve the congested court dockets and provide quicker relief to the injured, Congress raised the $1,000 limit to $2,500 in 1959. Pub. L. No. 86-238, 73 Stat. 471; See S. Rep. No. 797, 86th Cong., 1st Sess. 3-4 (1959); H.R. Rep. No. 323, 86th Cong., 1st Sess. 2-3 (1959). In 1966, Congress sought to further "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims * * *." S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966). Accordingly, all claimants are now required to file their claims with the relevant agency in the first instance. The agency, which of course has the best information and is best situated to investigate and dispose of the claim (*id.* at 3), is given six months to settle each claim. Only after exhausting these administrative procedures may the claimant resort to his judicial remedies.

2. It is readily apparent that the FTCA constitutes a comprehensive remedial scheme for the kind of claim raised here. In essence, respondent sued officials of the Federal Bureau of Prisons for the improper and inadequate medical treatment received by her son while he was in prison. The Bureau of Prisons is, of course, an agency covered by the FTCA. See 28 U.S.C. 2671. Moreover, the FTCA has long been construed to encompass prisoners' claims for damages consequent to prison medical malpractice. See, *e.g.*, *United States* v. *Muniz*, 374 U.S. 150, 151-152 (1963); *Brown* v. *United States*, 374 F. Supp. 723 (E.D. Ark. 1974). See also S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966). Indeed, if a complaint alleges medical mistreatment so serious as "to evidence deliberate indifference to serious medical needs" in violation of the Eighth Amendment (see *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)), the existence of a cause of action under the broader coverage of the FTCA cannot be doubted.[25]

[24] A suit dismissed under the statutory exceptions to the FTCA (28 U.S.C. 2680) is not a suit "under [28 U.S.C.] 1346(b)" within the purview of Section 2676 and thus does not bar an action against the individual employee.

[25] Insofar as respondent's complaint may have asserted that the prison authorities intentionally violated her son's

Claims such as those asserted by respondent thus stand on a completely different footing than those asserted by persons in Bivens' circumstances. Here, Congress has enacted a compensatory mechanism for injuries like those allegedly suffered by respondent. Furthermore, that federal remedy permits direct recovery against the public fisc rather than forcing the victims of unlawful official conduct to face the uncertainties of individual defendants' financial condition.[26] To be sure, the FTCA incorporates state law as a basis for recovery. But unlike the various state laws of trespass and false arrest canvassed in *Bivens* (403 U.S. at 394-395), the states' laws on negligence uniformly allow recovery for medical malpractice.[27]

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rights (A. 13), relief was available under 28 U.S.C. 2680(h), which allows actions against the United States for injuries caused by the intentional torts of "investigative or law enforcement officer[s]." See also S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973). Correctional officers and other employees of the Bureau of Prisons fall within the definition of "investigative or law enforcement officer[s]." See *Torres* v. *Taylor*, *supra*, 456 F. Supp. at 953-954; 18 U.S.C. 3050.

[26] The federal government, unlike some state and local jurisdictions, does not indemnify its employees for personal judgments arising out of their official actions. Compare Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 810-812 (1979).

[27] Here, of course, Indiana law controls. And the Indiana courts have long recognized a cause of action for medical malpractice. See, *e.g.*, *Carpenter* v. *Campbell*, 149 Ind. App. 189, 271 N.E. 2d 163 (1971); *Longfellow* v. *Vernon*, 57 Ind. App. 611, 105 N.E. 178 (1914). Because respondent is not the deceased's spouse, minor child, or dependent relative, Indiana law does limit her recovery to medical, burial, and administrative expenses, see Ind. Code Ann. § 34-1-1-2 (Burns

In short, it cannot be said that state negligence laws are "inconsistent or even hostile" to interests protected by the Eighth Amendment in this regard. See 403 U.S. at 394.

3. As we demonstrated in point IA, *Bivens* and its progeny admonish that when Congress has considered particular kinds of unlawful official conduct and selected specific remedies to compensate victims of that conduct, it is neither necessary nor appropriate to recognize an additional remedy implied directly under the Constitution. See 403 U.S. at 396-397; *id.* at 407 (Harlan, J., concurring); pages 17-24, *supra*. That principle obtains here since the FTCA is a comprehensive administrative and judicial remedy for violations of prisoners' rights such as those presented by respondent's complaint. Indeed, a constitutional cause of action for damages is especially inappropriate in this case, because it would allow litigants to

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1973) and pages 47-48, *infra*. But, as we demonstrate in point II, *infra*, respondent could only recover those items even if she sued under the Constitution. In any event, the *Bivens* decision turned on the relief available to a class of claimants and not the particular success or failure of Webster Bivens' potential suit under New York law. See 403 U.S. at 394-397; *id.* at 407-410 (Harlan, J., concurring). So too here, the appropriate inquiry is whether a constitutional damages action is necessary to vindicate the Eighth Amendment rights of prisoners who receive completely inadequate medical treatment. After all, no Eighth Amendment right of respondent's was violated. Instead, she sues on behalf of her son's estate, and if the FTCA constitutes an adequate remedy for the kind of claim derivatively raised by respondent, then there is no justification for implying an additional constitutional remedy.

avoid the statute of limitations,[28] the administrative procedures,[29] and other provisions [30] carefully imposed

[28] In a *Bivens* action—as in suits under 42 U.S.C. 1983—the courts adopt the pertinent state statute of limitations, which may vary greatly. See pages 43-44, *infra;* Lehmann, *supra,* 4 Hast. Const. L. Q. at 545-549. The FTCA, however, has a specific two-year statute of limitations (the same as that contained in the Indiana wrongful death statute). As originally enacted, the period of limitations was only one year. Ch. 753, Section 420, 60 Stat. 845; S. Rep. No. 1400, *supra,* at 33. Subsequently, Congress weighed the various relevant considerations and increased the period of limitations to two years. See Ch. 92, 63 Stat. 62. The House Report accompanying that Act states (H.R. Rep. No. 276, 81st Cong., 1st Sess. 4 (1949)):

> It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies. Nor, on the other hand, does it propose to encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence.

[29] From time to time Congress has considered and expanded the use of the administrative settlement mechanism in order to avoid congestion in the courts, unnecessary involvement of the Department of Justice, and, from the claimant's point of view, the delays in settlement that inevitably accompany the filing of a lawsuit. See pages 25-26 and note 23, *supra;* S. Rep. No. 797, 86th Cong., 1st Sess. 3-4 (1959); H.R. Rep. No. 323, 86th Cong., 1st Sess. 1-3 (1959); S. Rep. No. 1327, 89th Cong., 2d Sess. 2-4 (1966); H.R. Rep. No. 1532, 89th Cong., 2d Sess. 5-8 (1966).

[30] For example, the FTCA expressly limits the amount of attorneys' fees that may be extracted from an FTCA award or settlement. See 28 U.S.C. 2678. Violations of those limitations are punishable by fine or imprisonment. Moreover, Congress specifically chose to preclude awards of punitive damages and jury trials, both of which may be available in a *Bivens* action. See 28 U.S.C. 2674, 2402. See *Novotny, supra,* slip op. 8-9. While it might be argued that the unavailability of a jury trial suggests the inadequacy of the FTCA remedy, empirical data shows that juries are exceedingly biased against prisoners and in favor of government officials in these kinds of suits. See Project, *Suing the Police in Federal Court,* 88 Yale L.J. 781, 789-809 (1979).

by Congress in this area. See *Brown* v. *General Services Administration, supra,* 425 U.S. at 829-833; *Greater American Federal Savings & Loan Ass'n* v. *Novotny, supra,* slip op. 8-9; cf. *Touche Ross & Co.* v. *Redington,* No. 78-309 (June 18, 1979), slip op. 13; *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973).

Nonetheless, it has been suggested that the legislative history of the 1974 amendment to the FTCA [31] refutes the government's submission on this point. See *Hernandez* v. *Lattimore,* No. 78-2098 (2d Cir. June 7, 1979), slip op. 2896-2898; but see *Torres* v. *Taylor, supra.* Following the *Bivens* decision, Congress amended the FTCA to allow direct recovery against the government for some of the intentional torts of federal law enforcement officers. An earlier Senate Report [32] commented that

> this provision should be viewed as a counterpart to the *Bivens* case and its progenty [*sic*], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved.)

[31] Pub. L. No. 93-253, Section 2, 88 Stat. 50.

[32] The Senate Report was issued in 1973. The amendment was passed the following session of Congress without reports.

S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973). Although that report superficially supports respondent's contention, we submit that it does not undermine the conclusion that existing remedies militate against extension of *Bivens* in this case.[33]

The Senate Report initially observes that a *Bivens*-type action is "usually * * * a rather hollow remedy" (*ibid.*) and that the relief afforded by the FTCA is ordinarily far better. Thus, at least that portion of the legislative history [34] strongly suggests that application and extension of the *Bivens* rationale is inappropriate here because the FTCA provides comprehensive relief. See *Turpin* v. *Mailet*, *supra*, 579 F.2d at 166 ("Courts should only create a cause of action

[33] We note that except for cases falling under the Federal Drivers Act, the FTCA does not preclude initial resort to state tort remedies against the individual officers. See pages 34-35, *infra*. However, since the FTCA incorporates the same state law, invariably suit against the government will be preferable to suit against possibly judgment proof federal officials. In any event federal officials acting in the scope of their duties have absolute immunity against state tort liability. See *Butz* v. *Economou*, *supra*, 438 U.S. at 495; *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Granger* v. *Marek*, 583 F. 2d 781, 784 (6th Cir. 1978); *Evans* v. *Wright*, 582 F. 2d 20 (5th Cir. 1978).

[34] See also H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 4 (1976). Since the original FTCA predated *Bivens* and *Bell* v. *Hood*, *supra*, the legislative history accompanying the original Act does not shed any light on the interaction of the FTCA and constitutional damages actions. Because the critical inquiry is whether implication of a *Bivens*-type action is necessary to vindicate constitutional rights and not whether Congress specifically intended to substitute the FTCA for constitutional damages actions, the historical sequence of remedies is irrelevant.

where none exists or the need for one is demonstrated"). Although the Report then comments that the amendment should be "viewed as a counterpart to *Bivens*," that isolated statement in a single committee report does not purport to suggest whether the *courts* should recognize an implied constitutional damages action in an area addressed by the FTCA. In fact, the quoted language may well reflect Congress' understanding (albeit erroneous) that *Bivens* was a constitutionally required decision. See Dellinger, *supra*, 85 Harv. L. Rev. at 1545-1549; Katz, *supra*, 117 U. Pa. L. Rev. at 41 n.221; Hill, *supra*, 69 Colum. L. Rev. at 1152-1153. On this view, the passage quoted above is merely an effort on the part of the Senate Committee to avoid what it perceived to be a constitutional issue. Accordingly, the report seems too uncertain a basis for implying constitutional damages remedies, especially if the Court concurs in Congress' view that the FTCA is a more effective remedy than *Bivens*-type actions.

In any event, neither the 1974 amendment nor its legislative history touch upon the issue primarily posed by this case. That amendment concerns only intentional torts such as those at issue in *Hernandez* v. *Lattimore*, *supra*, and *Bivens* itself. Respondent, however, claims that prison officials negligently treated her son's medical condition—a type of official misconduct not addressed by S. Rep. No. 93-588. We further note that there may be some substantial differences between intentional torts and prison medical malpractice justifying *Bivens*-type

liability in the former class of cases but not the latter. The FTCA incorporates state law as a basis for liability, and although the Court indicated in *Bivens* that state tort law did not satisfactorily protect the interests underlying the Fourth Amendment (403 U.S. at 394), we have already demonstrated that the coverage of the FTCA in the area of prisoners' medical care greatly exceeds that encompassed by the Eighth Amendment. See pages 27-29, *supra*. Moreover, intentional torts typically involve individual misconduct arguably warranting individual liability whereas lack of proper medical care for prisoners involves a systemic breakdown rendering individual liability less appropriate.[35] Therefore, even if the Court would adhere to *Bivens* in the Fourth Amendment area despite the 1974 amendment, it does not follow that extension of *Bivens* is warranted in this case.

Nor is there any merit to respondent's suggestion (Br. in Opp. 9) that the exclusive remedy rules of the FTCA eviscerate the government's analysis. See 28 U.S.C. 2676, 2679(b)-(e).[36] Those provisions make the FTCA the exclusive remedy of a victim of unlawful governmental conduct in two circumstances: first, if a judgment is rendered in an FTCA suit falling under 28 U.S.C. 1346, and second, if the liability arises out of a vehicular accident. See *United States* v. *Gilman*, 347 U.S. 507, 509 (1954); note 33,

[35] For example, respondent's claim alleges inoperable machinery, improper planning and inadequate training.

[36] Section 2679(b)-(e) constitutes the Federal Drivers Act portion of the FTCA.

supra. Since Congress intended that Sections 2676 and 2679, where applicable, would extinguish recourse to existing state law remedies, see S. Rep. No. 736, 87th Cong., 1st Sess. 3-4 (1961); H.R. Rep. No. 297, 87th Cong., 1st Sess. 4 (1961),[37] an express legislative directive to that effect was required. Here, however, the question is not whether Congress explicitly intended the FTCA to replace existing remedies, but whether the judicial branch of government ought to recognize another, redundant remedy in an area that Congress has considered and addressed in positive legislation. Certainly, Sections 2676 and 2679 do not suggest that Congress wished the courts to imply new federal remedies thereby avoiding FTCA procedures. Cf. *Touche Ross & Co.* v. *Redington*, *supra*, slip op. 13. Indeed, insofar as they reflect a general congressional intent to limit the personal liability of government employees acting in the scope of their duties, Sections 2676 and 2679 seemingly militate against extending *Bivens* where the FTCA applies. See also 42 U.S.C. 233 (rendering FTCA exclusive remedy for medical malpractice by officials of the Public Health Service).

C. Considerations Of The Judicial Function And Public Policy Weigh Heavily Against Expansion Of *Bivens* In This Case

1. *The Judicial Role.* In point IA above, we observed that this Court and the lower federal courts

[37] Both the Federal Drivers Act and the judgment bar provision predated this Court's decision in *Bivens*, and it is therefore impossible to conclude that Congress in enacting Sections 2676 and 2679 sought to preserve *Bivens*-type remedies.

have repeatedly expressed their reluctance to imply a constitutional damages action when Congress has created an adequate and detailed federal remedy, such as the FTCA. See pages 17-24, *supra*. The reasons for this judicial forebearance seem apparent. First, as Mr. Justice Brandeis explained in his seminal exposition on the principles of constitutional adjudication, the Court does not " 'decide questions of a constitutional nature unless absolutely necessary to a decision of the case' " *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (concurring opinion), quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905). When a victim of unlawful official action may be fully recompensed under an existing statutory scheme, there is no necessity justifying implication of a redundant remedy based on the Constitution. See *Bivens*, *supra*, 403 U.S. at 407 (Harlan, J., concurring); Dellinger, *supra*, 85 Harv. L. Rev. at 1549-1551. Indeed, judicial activism in that circumtance squarely conflicts with the traditional proscription of unnecessary constitutional adjudication.

More important, recognition of a constitutional cause of action despite the existence of a detailed compensatory scheme trenches upon separation of powers principles. Congress, of course, is better equipped to investigate societal problems, to evaluate public concerns, and to legislate relief than are the courts. See, *e.g.*, *Bivens*, *supra*, 403 U.S. at 411-412 (Burger, C.J., dissenting); Monaghan, *supra*, 89 Harv. L. Rev. at 28-29; Dellinger, *supra*, 85 Harv. L. Rev. at 1556. See also *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314-316 (1947). If Congress

has failed to act, then the courts are warranted in granting appropriate relief to persons who have been injured by a federal agent's unconstitutional acts. *Bivens*, *supra*, 403 U.S. at 396-397; *Davis* v. *Passman*, *supra*, slip op. 18-19. But if a federal statute like the FTCA provides full relief for victims of unlawful official conduct, the courts are not justified in legislating an alternative remedy under the Constitution. And, as we have previously indicated (pages 29-31, *supra*), judicial deference is particularly warranted in this case because Congress has legislated a complete administrative and judicial remedy covering unlawful official conduct of the kind asserted here. See *Brown* v. *General Services Administration*, *supra*; *Great American Federal Savings & Loan Ass'n* v. *Novotny*, *supra*. See also *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656 (1966).

2. *Public Policy.* Underlying the legal analysis in this case are public policy questions of considerable moment.[38] We have contended above that because

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[38] Congress is currently considering further legislation in this area. See H.R. 2659, 96th Cong., 1st Sess. (1979). If enacted, this bill would substitute direct government liability for all individual liability in cases arising out of the performance of official duties. No proof of actual damages would be required for constitutional torts, minimum recovery would be $1,000, and in some cases maximum recovery would be $15,000. In addition, the government would waive most of the defenses now available to it or to the individual employees. The proposed legislation also provides for administrative sanctions. See *Federal Tort Claims Act Amendments: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (statement of then Dep. Attorney General Civiletti); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 1 (1979).

Congress has considered the problem of unlawful official conduct at least in the kinds of circumstances presented by this case and has formulated a comprehensive remedy for that problem, the courts should defer to Congress' judgment on the matter. But insofar as it is appropriate for the Court to weigh anew these legislative considerations, we submit that remitting the victims of governmental misconduct to their remedy under the FTCA serves several important functions.

From the claimants' perspective, a suit against the government is ordinarily preferable. At the outset, we note that proof under the FTCA will often be far less demanding than that required by the Constitution.[39] Because of jury sympathy for the individual officials and against plaintiffs with criminal records, obtaining a judgment against a federal official is, in any event, extremely difficult. See Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 788-809 (1979); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 2-3 (1979). Indeed, so far as we are aware, only seven judgments against federal employees have ever been awarded in the several thousand *Bivens*-type cases that have been brought.[40] Under the FTCA, however, the government and not an individual employee is the defendant, and, of course, the case is tried without a jury. Further-

[39] For example, medical malpractice in a prison usually will not rise to the level of an Eighth Amendment violation. See *Estelle* v. *Gamble*, *supra*, 429 U.S. at 105-106.

[40] Bell, *supra*, 16 Harv. J. on Leg. at 2 n.5.

more, as the en banc Second Circuit pointed out in *Turpin* v. *Mailet*, *supra*, 579 F.2d at 165, the government "is ordinarily not judgment-proof, and may provide the only source of recovery for an individual injured by a violation of his constitutional rights." And the speedy administrative procedures contained in the FTCA ensure that a meritorious claimant against the government will be compensated far more quickly than one who must seek judicial relief from individual officials, who are generally reluctant to settle. See, *e.g.*, S. Rep. No. 1327, *supra*, at 2.

In addition, substituting the government's liability for that of the individual benefits both the public at large and the operation of government. The fear of personal liability and the burden of trial "dampen[s] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.).[41] See H.R. Rep. No. 297, 87th Cong., 1st Sess. 3, 7 (1961); Dellinger, *supra*, 85 Harv. L. Rev. at 1555; Bell, *supra*, 16 Harv. J. on Leg. at 6 ("Despite the small odds an employee will actually be held liable in a civil suit, morale within the federal service has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous").[42] On the other hand, there

[41] The small possibility of state tort suits against individual officials does not weaken this point. Federal officials are protected by absolute immunity against such state tort law liability but have only a qualified immunity regarding constitutional torts. See *Butz* v. *Economou*, *supra*, 438 U.S. at 495; note 33, *supra*.

[42] Attorney General Bell further notes the difficulties that have beset the Department of Justice in defending suits

is substantial indication that imposing liability on the government alone not only encourages more vigorous official action but also actually leads to greater deterrence of constitutional violations by forcing the promulgation of corrective policies. See *Turpin* v. *Mailet*, *supra*, 579 F.2d at 165; Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 927 (1976). Moreover, since invariably FTCA claims involve injuries caused in the course of pursuing public objectives, the cost of compensating the victims "is more justly borne by the entire body politic than by agents of the Government." *Birnbaum* v. *United States*, 588 F.2d 319, 333 (2d Cir. 1978); see *Turpin* v. *Mailet*, *supra*, 579 F.2d at 165. Finally, we note that requiring claimants to pursue relief under the FTCA keeps numerous cases out of the courts.

In sum, to paraphrase Mr. Justice Harlan, a direct remedy against the Government is a desirable substitute for individual official liability. *Bivens*, *supra*, 403 U.S. at 410. In *Bivens* itself, of course, the sovereign had not waived its immunity and so only the implication of a constitutional damages action provided adequate relief for people in Bivens' shoes. Here, on the other hand, Congress has squarely addressed the issue of injuries caused by unlawful official conduct and has created a comprehensive remedy for injuries such as those purportedly suffered by respondent's son. Accordingly, "the need for damages

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against individuals. Often conflicts of interest have arisen requiring the government to hire outside counsel at great expense. *Id.* at 7-9.

relief [under the Constitution has been] obviated." *Davis* v. *Passman*, *supra*, slip op. 19.

II

INDIANA LAW GOVERNS THE SURVIVAL OF RESPONDENT'S CONSTITUTIONAL DAMAGES ACTION

If the Court rejects our primary submission, it must then fashion a rule regarding the survival of implied constitutional causes of action. The court of appeals concluded that although ordinarily state law supplies the applicable law of survivorship, "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action" (Pet. App. 13a). We cannot acquiesce in such an unprecedented free-wheeling rule. In our view, a court is justified in creating federal common law in this area only in the extraordinary circumstance that application of the state survival statute would wholly frustrate the constitutional interests involved in a *Bivens*-type suit. Because Indiana survival law does not thwart the vindication of constitutional rights in this or other similar cases, we submit that the court of appeals should have applied local law to respondent's claim. Had the court of appeals done so, it would have affirmed the district court's dismissal of respondent's suit for failure to satisfy the $10,000 jurisdictional amount requirement set forth in 28 U.S.C. 1331. See note 46, *infra*.

A. In The Absence Of Contrary Congressional Indication, Federal Law Incorporates State Law With Regard To The Survival Of Federal Question Litigation

It is beyond dispute that the issue of what law governs the survival of constitutional damages actions is a question of federal law. See, *e.g.*, *Burks* v. *Lasker*, No. 77-1724 (May 24, 1979), slip op. 4-5; *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978); *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966). In other words, there is no contention in this case that state law applies *ex proprio vigore*. But the fact that the origins of respondent's cause of action are in federal (constitutional) law does not make state law irrelevant. See, *e.g.*, *Burks* v. *Lasker*, *supra*, slip op. 5; *United States* v. *Kimbell Foods, Inc.*, No. 77-1359 (Apr. 2, 1979), slip op. 11; *DeSylva* v. *Ballentine*, 351 U.S. 570, 580 (1956). To the contrary, the pertinent precedents of this Court compel the conclusion that where Congress has not specified a particular rule to control quasi-procedural issues such as the period of limitations or survivorship, federal law adopts the relevant state standard unless application of local law would utterly defeat the federal interests involved.

1. Congress often does not supply all of the procedural details of a federal remedial scheme. Indeed, almost by definition, Congress will not have promulgated such rules for causes of action created as a matter of federal common law. In such circumstances, this Court time and again has drafted state law to fill these voids so long as it "furnish[es] convenient solutions in no way inconsistent with adequate protection of the federal interest." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947). For example, as early as 1830, the Court concluded that state statutes of limitations supplied the time period within which a federal cause of action must be brought, unless Congress has provided a specific period of limitations. *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) 270, 276-277 (1830). And that rule has been consistently followed. See, *e.g.*, *Campbell* v. *Haverhill*, 155 U.S. 610 (1895); *McClaine* v. *Rankin*, 197 U.S. 154 (1905); *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1871); *International Union, UAW* v. *Hoosier Cardinal Corp.*, *supra*; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1870).

The Court's analysis in *International Union, UAW* v. *Hoosier Cardinal Corp.*, *supra*, highlights the point sought to be made here. In that case, the Court held that although the policies underlying the national labor laws require a uniform federal common law of collective bargaining agreements,[43] the appropriate state statute of limitations governs a suit brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to enforce a collective bargaining agreement. The Court observed that quasi-procedural rules like a statute of limitations, which do not have a substantial effect upon day-to-day activity, come into play only when the interests sought to be protected by federal law have been defeated. See 383

[43] See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).

U.S. at 702 & 703 n.4. The Court concluded (*id.* at 702-703):

> Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.

Similarly, the law governing survival of constitutional damages actions does not become an issue until after the policy of deterring federal officials from unconstitutional behavior has failed in its purpose. And, except perhaps for the hypothetical case of a federal official who, in depriving a person of his constitutional rights, kills rather than maims because of a peculiar local survival statute, state laws of survivorship simply do not affect or regulate primary daily activity. Accordingly here, as in *International Union, UAW*, "there is no justification for the drastic sort of judicial legislation that is urged" by respondent. 383 U.S. at 703. Indeed, since laws of survivorship involve traditionally local matters such as inheritance laws, domestic relations, and the administration of estates, whereas statutes of limitations do not, the argument for a uniform federal survival rule is even weaker than the case for a uniform period of limitations. See *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 18; *DeSylva* v. *Ballentine*, *supra*, 351 U.S. at 580; *United States* v. *Standard Oil Co.*, *supra*, 332 U.S. at 308-309.[44]

Moreover, like statutes of limitations, wrongful death and survival laws are also inherently statutory in nature. At common law, causes of action did not survive the death of the injured person and there was no recovery for wrongful death. See, *e.g.*, *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 344-345 (1937); F. Harper and F. James, Jr., 2 *The Law of Torts* § 24.1, at 1284 (1956). In the absence of common law analogues, the courts are less able to fashion such rules. See Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 Harv. L. Rev. 66, 94 (1955). Thus, as a matter of both convenience and jurisprudential limitations, adoption of state survival rules would ordinarily seem to be the desirable approach to these problems. That conclusion is strongly supported, if not compelled, by the Rules of Decision Act, 28 U.S.C. 1652, which directs the federal courts to apply state law in civil cases "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." See *Hill*, *supra*, 69 Harv. L. Rev. at 76-90.

2. The Court's recent decision in *Robertson* v. *Wegmann*, *supra*, settles the proposition that state survival laws generally govern constitutional damages actions against federal officials. *Robertson* involved a suit for equitable and compensatory relief brought

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[44] If, for example, the question arose as to which of several women was the decedent's surviving spouse, undoubtedly federal law would incorporate state law to resolve who could sue to vindicate the deceased's interests. Cf. 42 U.S.C. 416(h) (Social Security Act expressly adopts state domestic relations law).

against a district attorney in New Orleans and others under 42 U.S.C. 1983. The complaint alleged that the defendants had conspired to deprive the plaintiff of his civil rights by repeatedly harassing him and prosecuting him in bad faith. After the district court had granted the plaintiff's request for an injunction but before trial on the issue of liability for damages, the plaintiff died. Thereafter, both the district court and the court of appeals concluded that federal common law permitted the action to go forward even though the Louisiana law of survivorship would have abated the action. 436 U.S. at 586-588. This Court reversed, holding that ordinarily state survival laws control damages suits against state officials pursuant to Section 1983. *Id.* at 590-595.

We are unable to perceive any distinction between state officials and their federal counterparts that renders state laws of survivorship any less applicable to the latter. Cf. *Butz* v. *Economou, supra,* 438 U.S. at 498-499 & n.25. Respondent contends (Br. in Opp. 12, 14) that *Robertson* is inapplicable because the Court's analysis in *Robertson* relies in part on 42 U.S.C. 1988. Section 1988, which instructs the federal courts to turn to state law to supplement "deficiencies" in the Civil Rights Acts so long as that body of law is "not inconsistent with the Constitution and laws of the United States," *Robertson, supra,* 436 U.S. at 588; 42 U.S.C. 1988, does not pertain directly to this case. But, as the court of appeals recognized (Pet. App. 8a-9a), it is certainly not unreasonable for the courts to be guided by that statute and the decisional gloss given the Civil Rights Act

generally in fleshing out the contours of implied constitutional damages actions. See also *Butz* v. *Economou, supra,* 438 U.S. at 498-499. Moreover, both the FTCA, insofar as it represents Congress' considered judgment that state law may be invoked to redress injuries caused by federal officials, and the Rules of Decision Act, which like Section 1988 directs the courts to fill voids in federal law with compatible state provisions (see page 45, *supra*), strongly suggest the soundness of this approach.

Robertson, nonetheless, is not dispositive of this case. The Court specifically reserved several questions in *Robertson.* First, the Court noted that a different result might obtain if the pertinent state survival law was generally inhospitable to constitutional tort claims. Second, the Court intimated no view "about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." 436 U.S. at 594. As we demonstrate below, neither of these points justifies creation of a federal common law of survivorship in the circumstances of this case.

B. There Is No Justification For Creating A Federal Common Law Of Survivorship Rather Than Applying State Survival Law In This Case

Under Indiana law,[45] all tort claims survive to some extent. See note 6, *supra.* If the tort involves per-

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[45] We do not understand respondent to claim that any other state's survival law applies here. Indiana is the forum state, the place where the alleged cause of action arose, and the residence of many of the defendants as well as respondent's son. See Hill, *supra,* 69 Harv. L. Rev. at 88-90, 91-92, 100.

sonal injuries but does not cause the death of the injured party, the legal representative may recover loss of income and medical, hospital and nursing expenses resulting from the injury. Ind. Code Ann. § 34-1-1-1 (Burns 1973). If the tort causes death, the court or jury may usually award decedent's representative all normal damages "including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission." Ind. Code Ann. § 34-1-1-2 (Burns 1973). However, where, as here, the decedent leaves no spouse or dependent children or kin, the Indiana statute limits, but does not abate, the kinds of damages that may be recovered. In that circumstance, the decedent's estate can only obtain compensation for hospital, medical, funeral, and administration expenses.[46]

The Indiana survival and wrongful death laws thus compare favorably to the Louisiana provisions adhered to in *Robertson*. Where the Louisiana code abated some actions completely, the Indiana statutes permit survival of all actions. And in most circumstances, including most wrongful deaths, Indiana law would afford substantial recovery for personal injuries caused by the unconstitutional conduct of a-

[46] Here, of course, respondent had no hospital, medical or funeral expenses and both courts below found that his administration expenses would not approach the $10,000 jurisdictional requirement of 28 U.S.C. 1331 (Pet. App. 5a n.4, 26a). The 1976 amendment to Section 1331 does not affect the jurisdictional amount for damages actions against federal officials. See, *e.g.*, H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 2-11 (1976).

federal employee. Without question, Indiana reduces the windfall relief available to non-dependent, non-spousal relatives. But that decision is hardly unreasonable. Cf. *Bangor Punta Operations, Inc.* v. *Bangor & Aroostock R.R.*, 417 U.S. 703 (1974) (windfall recoveries are disfavored). The survival and wrongful death statutes of many states limit either the kinds of damages available or the possible class of beneficiaries or both.[47] Moreover, at least two federal statutes provide that only spouses, children, and *dependent* kin may receive certain circumscribed death benefits. See 5 U.S.C. 8133(a); 33 U.S.C. 909. Furthermore, if a conspiracy to deprive a person of his civil rights in violation of 42 U.S.C. 1985 causes death, the maximum wrongful death liability under any circumstance is $5,000. See 42 U.S.C. 1986.

In light of the generally liberal recovery provisions of Indiana law and its similarity to many state and federal statutes, it is apparent that the Indiana statutes do not frustrate the purposes of compensation and deterrence underlying the creation of constitutional damages actions. See *Robertson, supra*, 436 U.S. at 590-591; *Carey* v. *Piphus*, 435 U.S. 247, 254-257 (1978). Indiana ensures that spouses and dependents are fully compensated, and here, as in *Robertson*, "[t]he goal of compensating those injured by a deprivation of rights provides no basis for re-

[47] See, *e.g.*, F. Harper and F. James, Jr., *supra*, at 1285-1289, 1328-1337; Cal. Prob. Code § 573 (West. Cum. Supp. 1979); Cal. Civ. Pro. Code § 377 (West 1973); Tex. Civ. Code Ann. tit. 77, art. 4675 (Vernon 1952); N.Y. Est., Powers & Trusts Law §§ 5-4.3, 5-4.4, 11-3.2 (McKinney 1967); Ill. Ann. Stat. ch. 70, § 2 (Smith-Hurd 1959).

quiring [greater] compensation of one who is merely suing as the [administratrix] of the deceased's estate." 436 U.S. at 592. Nor can it be fairly contended that application of the Indiana rules will not deter unlawful conduct, especially of the sort complained of here. Many, if not most, prisoners will be survived by either a spouse or a dependent (*id.* at 591-592), and it is simply inconceivable that the breakdown of the entire Terre Haute prison medical system asserted by respondent was predicated on her son's peculiar status. See 436 U.S. at 592-593 & n.10.[48]

Accordingly, we do not believe that the fact that the alleged constitutional tort caused the death of respondent's son justifies judicial legislation of a blanket federal rule of survivorship favoring plaintiffs. Where a federal official purposefully injures or kills a person in violation of the Constitution relying on the provisions of local law, application of that state statute might be said to frustrate the vindication of important federal interests. But here, respondent merely claimed that various prison officials and medical personnel were extremely incompetent and unconcerned in the treatment of her son. To suggest that the untrained attending nurse twice injected Jones with the wrong drug because of his awareness of the intricacies of Indiana survivorship

[48] In *Carey* v. *Piphus, supra,* the Court concluded that the basic purpose of constitutional damages actions under 42 U.S.C. 1983 was compensation (435 U.S. at 254-255) and that deterrence is "inherent in the award of compensatory damages." *Id.* at 256-257. Since application of Indiana law fully compensates the victims of constitutional torts it also deters officials from abusing their public trusts.

law strains credulity. In sum, the court of appeals erred in creating a federal common law of survivorship. See *Whitehurst* v. *Wright,* 592 F.2d 834, 840-841 (5th Cir. 1979); *Beard* v. *Robinson,* 563 F.2d 331, 332-334 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978); *Hall* v. *Wooten,* 506 F.2d 564 (6th Cir. 1974); *Mattis* v. *Schnarr,* 502 F.2d 588, 590-591 (8th Cir. 1974); *Brazier* v. *Cherry,* 293 F.2d 401, 405-409 (5th Cir.), cert. denied, 368 U.S. 921 (1961); *Perkins* v. *Salafia,* 338 F. Supp. 1325, 1326-1327 (D. Conn. 1972).[49]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1979

[49] The court of appeals suggested (Pet. App. 10a-13a) that at least some of these cases were distinguishable because the state law involved permitted survival of the action. (Of course, here too, Indiana allows respondent to recover circumscribed damages in state court). But "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson, supra,* 436 U.S. at 593.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1261

NORMAN A. CARLSON, Director,
Federal Bureau of Prisons, *et al.*,

Petitioners,

v.

MARIE GREEN, Administratrix of
the Estate of JOSEPH JONES, JR.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

CITATIONS

Cases:

Cases, continued:

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 581 F.2d 669 (7th Cir. 1978) (Pet. App. 1a-17a). The decision of the District Court is not reported (Pet. App. 22a-27a).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 18a–19a) was entered on August 3, 1978. A petition for rehearing was denied on November 24, 1978 (Pet. App. 20a–21a). A petition for writ of certiorari was filed on February 13, 1979, and was granted on June 28, 1979, along with the motion of Respondent for leave to proceed *in forma pauperis*. (A. 29). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. §1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

The Plaintiff-Respondent (hereinafter Plaintiff), Mrs. Marie Green, is the next of kin and Administratrix of the Estate of Joseph Jones, Jr., her deceased son, who was a federal prisoner at Terre Haute Federal Correctional Center, and who, she alleges, died as a result of medical care so inappropriate as to evidence deliberate indifference to serious medical needs.[1]

Plaintiff alleges the following in her complaint: Joseph Jones had been diagnosed as a chronic asthmatic in 1972 when he entered the federal prison system. In July 1975, his asthmatic condition required hospitalization for eight days at St. Anthony's Hospital in Terre Haute. Despite the recommendation of the treating physician at St. Anthony's that he be transferred to a prison in a more favorable climate, Jones was returned to the Terre Haute prison.[2] Upon his return he was not given proper medication and was not given the steriod treatments ordered by the physician at St. Anthony's.

On August 15, Jones was admitted to the prison hospital with an asthmatic attack. Although he was in serious condition for some eight hours, no doctor saw him because none was on duty and none was called in. Defendant Dr. Benjamin DeGarcia, the chief medical

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[1] Plaintiff's complaint contains a claim under the Fifth and Eighth Amendments for the "deliberate indifference to serious medical needs" as well as a claim under the equal protection component of the Fifth Amendment, alleging that this deliberate indifference was caused in part by racial discrimination (Count III, Plaintiff's Complaint).

[2] The treating physician made two specific recommendations: Lexington, which has a good management program for chronic diseases, and Sandstone, which has a drier climate. The recommendations were ignored.

officer directly responsible for the prison medical services, did not provide any emergency procedure for those times when a physician was not present, and allowed a prison hospital to function with totally inadequate staff, improperly trained, and without proper equipment and procedures.

As time went on, Jones became more agitated and his breathing became more difficult. Although Jones' condition was serious, defendant Medical Training Assistant William Walters, a non-licensed nurse then in charge of the hospital, deserted Jones for a time to dispense medication elsewhere in the hospital. When he returned, Walters brought a respirator and attempted to use it, despite the fact that Walters had been notified two weeks earlier that the respirator was broken. After Jones pulled away from the respirator and told Walters that the machine was making his breathing worse, Walters administered two injections of Thorazine, a drug contraindicated for one suffering an asthmatic attack. A half-hour after the second injection, Jones suffered a respiratory arrest. Walters and Staff Officer Emmett Barry brought emergency equipment to administer an electric jolt to Jones, but neither man knew how to operate the machine. Jones was then removed to St. Francis Hospital in Terre Haute; upon arrival he was pronounced dead.

The death of Jones was the fourth inmate death from medical care inadequacies in a seven-month period. Despite letters of protest to prison officials (specifically placing Defendants Carlson, Benson and Brutsche on notice), as well as a peaceful work stoppage joined in by 900 prisoners after the third prisoner death, the Defendants did nothing to change the blatantly inadequate medical conditions. Thus this case presents a classic

example of deliberate indifference to serious medical needs resulting in the denial to the decedent prisoner of basic human and constitutional rights.

On June 18, 1976, Plaintiff Marie Green filed a complaint on behalf of her deceased son's estate. Named as Defendants were five officials, officers and employees of the Federal Bureau of Prisons, sued in their official and individual capacity, and the Assistant Surgeon General of the United States, also in his official and individual capacity.[3] Also named as a Defendant was the Joint Commission on Accreditation of Hospitals, which was responsible for accrediting and inspecting the prison hospital at Terre Haute.

The complaint, invoking 28 U.S.C. 1331(a) jurisdiction, alleged that Joseph Jones, Jr. died as a result of medical care so inappropriate as to evidence intentional maltreatment, and that the Defendants' acts violated the due process clause and the equal protection component of the Fifth Amendment in addition to the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiff prayed for a total of $1,500,000 in actual damages, and $500,000 in punitive damages.

On January 10, 1977, the District Court, pursuant to motions filed by the Defendants, dismissed the complaint for lack of subject matter jurisdiction. The Court held that the Plaintiff could not satisfy the $10,000 jursidictional amount requiremnt of 28 U.S.C. §1331(a) because of the limitations on recoverable damages under the

[3] Defendant Brutshe visited Terre Haute twice in 1975 to review specific cases, as well as to inspect the total medical program at Terre Haute. He gave the medical facilities his approval and failed to recommend needed changes in equipment, procedures and availability of trained medical staff.

Indiana wrongful death and survival statutes. In dismissing the complaint, the District Court noted that these Indiana State statutes were the "sole mechanisms" (Pet. App. 26a) by which Mrs. Green, as the sole representative of her son's estate, could maintain an action for damages.

The Trial Court recognized that an action for damages may be brought for a violation of a right guaranteed by the Constitution, *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), and further that Joseph Jones, Jr., could have maintained this *Bivens*-type action under *Estelle v. Gamble,* 429 U.S. 97 (1976), had he survived the alleged wrongs. However, the District Court determined erroneously that survival of Jones' federal claim was governed by state law.

The Seventh Circuit Court of Appeals reversed the decision of the District Court in all relevant parts. The panel agreed with the District Court that the Plaintiff had sufficiently alleged a *Bivens*-type right of action arising directly under the Eighth Amendment. Further, the Court, refusing to apply the Indiana survival statute, found the jurisdictional amount requirement of 28 U.S.C. §1331(a) to be satisfied. The Court concluded that "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants *whose conduct results in death,* the federal common law allows survival of the action." *Green v. Carlson,* 581 F.2d 669, 675 (7th Cir. 1978) (emphasis added).

On November 24, 1978, the Seventh Circuit Court of Appeals, on consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by the Defendant-Petitioners (hereinafter Defendants), and after ordering the Plaintiff to file an answer to said Petition, denied the Petition for rehearing in all respects. (Pet.

App. 20a–21a). The Defendants, on February 13, 1979, filed their petition for a writ of certiorari, raising for the first time the issue of the Federal Tort Claims Act as an exclusive, adequate, alternative remedy. This Court granted certiorari on June 18, 1979.

SUMMARY OF ARGUMENT

I.

The Plaintiff has alleged serious violations of the Fifth and Eighth Amendments to the United States Constitution which resulted in the death of Joseph Jones, Jr. Specifically, she alleges that these constitutional deprivations, motivated in part by racial animus, constituted deliberate indifference to serious medical needs. *Estelle v. Gamble,* 429 U.S. 97 (1976). Such claims are cognizable directly under the Constitution. *Bivens v. Six Named Unknown Agents,* 403 U.S. 388 (1971); *Davis v. Passman,* ___ U.S. ___, 99 S.Ct. 2264 (1979). The Defendants' characterization of Plaintiff's complaint as merely one of negligent medical malpractice (*see, e.g.,* Br. Pet. at 27, 33) misrepresents the facts pled and disregards the opinions of the two Courts below. This effort is designed to make colorable its groundless assertion that the Federal Tort Claims Act (FTCA) provides an exclusive and fully adequate remedy for the Plaintiff.

II.

As an examination of the FTCA demonstrates, it fails as a constitutionally adeqaute substitute for a *Bivens* remedy. No further proof need be sought than the fact that Plaintiff's claim, under the FTCA, would abate because the choice of law provision of the Act, 28 U.S.C.

§1346(b), would apply the Indiana survival statute. *Ind. Code Ann.* §34-1-1-1. The FTCA fails to fully effectuate the goals of compensation and deterrence which underlie a *Bivens*-type action, and undermines the important policy of uniform application of laws. The failure in deterrence flows from the Act's complete removal of the individual wrongdoer from personal liability and the failure to provide for punitive damages or a disciplinary mechanism. Deterrence of unconstitutional acts is an important cornerstone of *Bivens* claims, as well as its state action counterparts under 42 U.S.C. §1983. *Bivens; Butz v. Economou*, 438 U.S. 478 (1978). The Plaintiff's opportunity to seek full compensation is severely limited by the Act's eradication of the right to trial by jury; its requirement of administrative exhaustion; its extension to the government of additional defenses to, and immunities from, suit; and its bar to prejudgment interest. Further, it strips the Plaintiff of the power and strength of her constitutional claims, reducing them to a mere tort. The importance of this cannot be minimized, as a *Bivens* claim, like 42 U.S.C. §1983 claims, is support by a body of decisional law, grounded in the Constitution and the Bill of Rights. The decisional law, which repeatedly recognizes the importance of constitutional claims, would aid the Plaintiff both in pretrial discovery and at the trial itself. Further, the moral and legal power of a constitutional claim has an important influence on the trier of fact. The FTCA provides the Plaintiff here with *no remedy* and provides others who suffer Eighth Amendment claims under *Estelle* with a woefully inadequate remedy.

III.

Congress never intended the Act to apply to Plaintiff's claims, or for it to be her exclusive remedy. Prior to 1974, the FTCA never even applied to intentional harms, and, in the 1974 Amendments, Congress expressly made the FTCA remedy for certain intentional torts supplemental to a *Bivens* constitutional claim. Further, Congress has expressly rejected repeated attempts by the Department of Justice to amend the Act to include constitutional harms and to make that remedy exclusive.

IV.

The Court of Appeals correctly created a federal common law or survival where application of the Indiana survival statute would abate the Plaintiff's action against these Defendants, whose conduct resulted in the death of Joseph Jones. Application of the Indiana survival statute would frustrate the purpose of compensation and deterrence which underlie a constitutional damage action.

Where no state interest or policy is involved or effected, as is the case here, it is not necessary for the federal courts to look to state law. This conclusion is fully supported by *Bivens* where this Court rejected the assertion that remedies for violations of constitutional rights were to be tied to the vagaries of state tort law. *Cf. Monroe v. Pape*, 365 U.S. 167 (1961).

If resort is made to state law in fashioning a federal rule on survival, the result will be the same. Where the state survival statute is inconsistent and hostile to the policy underlying this *Bivens* claim, it must be rejected. Where a state survival statute does not provide for survival of a whole class of tort actions, and where death is caused by the unconstitutional conduct complained of, the state law must be rejected. This is the case here as

the Indiana survival statute, *Ind. Code Ann.* §34-1-1-1, totally abates not only this action but all actions where the conducts results in death. The Court of Appeals properly created a federal common law of survival in this case. Any other result would not merely be hostile to the policy which underlies constitutional damage actions, it would subvert that policy.

ARGUMENT

I.

THE PLAINTIFF HAS STATED CLAIMS ALLEGING VIOLATIONS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENTS, AND THIS COURT MUST ENSURE FULL AND EFFECTIVE REMEDIES FOR SUCH DEPRIVATION.

The allegations against the defendants in this case involve the most egregious kind of behavior—deliberate indifferences to Joseph Jones' serious medical needs resulting in his death, motivated, in part, by racial discrimination.[4] As both courts recognized below, these allegations rise to the level of constitutional violations, and allow the plaintiff, as the administratrix of her son's estate, to sue directly under the Constitution. Yet the defendants argued, without precedent or reason, that

[4] Although totally ignored by the defendant's brief, Count III of plaintiff's claim alleges that:

> . . . the absolute failure to provide a positive course of essential medical treatment was caused in part by the fact that the deceased was black, and he was denied basic humane medical treatment, which resulted in his death, on the basis of race, in violation of the equal protection component of the Fifth Amendment to the United States Constitution.

Plaintiff's equal protection claim, under even the most tortured reasoning, is not in any way covered by the Federal Torts Claims Act.

plaintiff's relief should be limited to the remedy available under the Federal Tort Claims Act (hereinafter the FTCA), which does not contemplate the claims raised in this case.[5]

In *Bivens v. Six Names Unknown Agents,* 403 U.S. 388 (1971), the victims of an unlawful arrest, search and seizure, brought suit against federal law enforcement officers. In holding that the Court could create a judicial remedy for the violation of a right guaranteed by the Fourth Amendment, this Court clearly established "that a citizen suffering from a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction to obtain an award of monetary damages against the responsible federal officials." *Butz v. Economou,* 438 U.S. 478, 504 (1978).

Last term this Court specifically reiterated its holding in *Bivens,* allowing a damage suit for a violation of the due process clause of the Fifth Amendment. *Davis v. Passman,* ___ U.S. ___, 99 S.Ct. 2264 (1979). There can be no question that this Court has recognized the judicial obligation to fashion a sufficient remedy to redress violations of constitutional rights.[6]

[5] Even the defendants did not consider that plaintiff's claims were covered by the FTCA, having not raised the issue of the Act's exclusivity before either of the Courts below.

This failure not only supports plaintiff's argument that her allegations are not fully redressable under the FTCA, but also that the writ of certiorari was improvidently granted. See Lawyers' Committee *amicus* brief at page 9. The plaintff does not raise this latter contention as she believes it is in her best interest, as well as the interest of future victims of unconstitutional harms that this Court rejects the defendant's belated and groundless position on the merits.

[6] Although this Court has not had many occasions to review the appropriateness of a damage remedy to vindicate violations of Constitutional rights, when it has been asked, it has unhesitatingly exercised its inherent power under Article III, §2 of the Consti-

[footnote continued]

Here, the Plaintiff's complaint alleges violations of fundamental constitutional protections contained in the Fifth and Eighth Amendments. Taking the allegations in Plaintiff's complaint as true, the District Court and the Court of Appeals found that Plaintiff's claim constituted a serious deprivation of constitutional rights.[7]

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tution to do so. *Wiley v. Finkler*, 179 U.S. 58 (1900); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Jacobs v. United States*, 290 U.S. 13 (1939).

In *Bell v. Hood*, 327 U.S. 678 (1946), although reserving decision on the specific question decided later in *Bivens*, this Court noted that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 327 U.S. at 684.

[7]Judge Noland's "Order Granting Defendants' Motions to Dismiss and Entry of Judgment Thereon," dated January, 1977 (See Appendix D, Petition for Writ of Certiorari), stated, "The Court believes that given the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under §1331 alleging a denial of proper medical treatment. *Estelle v. Gamble, supra.*" (Pet. App. 26a)

Similarly, Judge Swygert, speaking for a unanimous panel of the Seventh Circuit Court of Appeals in reversing the district court on the question of survival stated:

> The federal defendants challenged the sufficiency of the complaint to state a claim for damages under the Constitution. They contend that plaintiff's allegations merely assert a medical malpractice claim against the individual defendants cognizable in the state courts. We note that state law would apply to a claim of medical malpractice by federal employees. However, if the suit were against the federal government, it would be filed in federal court pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq., not in state court. *United State v. Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 10 L.Ed. 2d 805 (1963) . . . Plaintiff's claim here alleges serious deprivation of constitutional rights, not mere negligence.
>
> . . . . .
>
> Under the criteria delineated in *Estelle*, the alleged conduct of the federal defendants rises to the level of constitutional violations.

(Pet. App. 13a-15a)

The Plaintiff has stated a claim of deliberate indifference to serious medical needs resulting in the deprivation of Joseph Jones' life. This claim is encompassed by the prohibitions against cruel and unusual punishment and therefore involves constitutionally protected rights.

This Court specifically recognized in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) that "deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment."[8] In recognizing that such a claim rose to the level of cruel and unusual punishment,[9] this Court reasoned:

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases such a failure may actually produce physical "torture or a lingering death" . . . . The evils of most immediate concern to the drafters of the [Eighth] Amendment. 403 U.S. at 103.

Respondent's complaint states the strongest of *Estelle* claims. The deliberate refusal to transfer prisoner Jones to a prison in a more appropriate climate despite the specific medical recommendation; the failure to provide prisoner Jones with his prescribed medicine; the total

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[8]The Court in *Estelle* further stated that such a violation occurs "whether the indifference is manifested by prison doctors in their response to the prisoners' needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." 429 U.S. at 105. *See also, Lee v. Olmstead*, 582 F.2d 1291 (4th Cir. 1978), *cert pending sub nom, Moffitt v. Lee*, No. 78-1260.

[9]This Court has found that the protections of the Eighth Amendment are particularly applicable to convicted prisoners. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978); *Ingraham v. Wright*, 430 U.S. 651, 664-71 (1977).

absence of any physician, competent paramedic, or emergency procedures, during a period of extreme medical need for prisoner Jones; the attempted use of a respirator known to be malfunctioning; the injection of contraindicated drugs and the prison staff's inability to operate the "electric jolt" machine; and the defendant's prior notice of these serious medical care inadequacies[10] constitute a gross level of indifference and cruelty.[11]

Despite the overwhelming allegations of serious constitutional violations resulting in death, the Defendants characterize this case as merely one of negligent medical malpractice. (*See, e.g.*, Pet. Br. at 27, 33) The Defendants' posture, however, misrepresents the substantial constitutional claims involved here in an effort to make colorable its groundless contention that the FTCA provides an exclusive and fully adequate remedy for the Plaintiff. The Defendants must diminish the nature of Plaintiff's claim, from a constitutionally protected right to one of mere negligence, in an effort to circumvent the constitutional remedy dictated by *Bivens* and *Davis*. Injuries inflicted by federal officials acting under color of law which result from deliberate indifference to serious

[10]This notice included the death of three black prisoners within the prior seven months due to these medical inadequacies and a resultant series of prisoner protests and complaints.

[11]The facts of this case are more compelling than *Ricketts v. Ciccone*, 371 F.Supp. 1249 (W.D. Mo. 1974), where the district court, granting a writ of habeas corpus, held that transferring a federal prisoner, whose chronic rhinitis would be best treated in a climate of low humidity, such as at the Federal Correctional Institute at LaTuna, Texas, to the U.S.P., Terre Haute, Indiana, in a climate of high humidity, would be violative of the Eighth Amendment prohibition against cruel and unusual punishment.

medical needs of a prisoner "while no less compensable in damages than those inflicted by private parties and substantially different in kind" to medical malpractice. 403 U.S. at 409 (Harlan, J., conferring).

This Court's determination in *Bivens* that the Fourth Amendment constitutes an independent limitation on the exercise of federal power applies with equal force to the Fifth and Eighth Amendments. The rights protected under these Amendments are of equal importance and magnitude, as the right to be free from cruel and unusual punishment is certainly no less significant than to be free from unreasonable search and seizure. Moreover, most lower courts have recognized that *Bivens* mandates a judicial remedy for violations of all constitutionally protected rights.[12] So long as the aggrieved plaintiff can demonstrate that the interest is one protected by the Constitution, that monetary compensation would be appropriate, and that the conduct complained of is the sort of abuse and power necessary to raise an ordinary tort to the stature of a constitutional violation,[13] "the

[12]*See, e.g., Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977); *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928 (9th Cir. 1977); *cert granted sub nom, Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 436 U.S. 943 (1978).

For exhaustive annotations, see Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 Hastings Const. L.Q. 531, 567-68 (1977). *See also, Davis v. Passman*, 571 F.2d 793, 897 n. 6 (5th Cir. 1978) (*en banc*) (Goldberg, J. dissenting), *reversed*, ___U.S. ___, 99 S.Ct. 2264 (1979).

[13]*See Estelle v. Gamble*, 429 U.S. 97 (1976). As *Estelle* demonstrates, negligent medical malpractice does not rise to the level of a constitutional violation. It is necessary to establish that the official acted with a degree of intent or extreme culpable negligence in bringing about the events that caused the aggrieved individual injury, as Plaintiff here has sufficently alleged.

entire panoply of personal and property rights enumerated in the first eight amendments to the Constitution . . . would seem equally appropriate predicates for damage remedies."[14]

This Court is not being asked to *extend* its holding in *Bivens*, as argued by the Defendants, but merely to apply it to other fundamental constitutional rights of equal stature and significance so that an effective remedy can be obtained, as clearly contemplated by the reasoning of the decision. Unless Congress has created an exclusive and equally effective remedy (see discussion below), *Bivens* and *Davis* constitutionally mandate that a judicially created remedy be employed in this case.[15] For this Court to defer to a congressional remedy which is not "equally effective" would be an abdication of its responsibility to insure that the policy of deterrence and compensation inherent in the redress of constitutional violations is enforced. Such abdication would seriously diminish the importance of the Bill of Rights as a source of positive law and as an independent limitation on the exercise of federal power.[16]

[14]Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 934 (1976).

[15]This Court has twice previously rejected the Defendants' argument here that the result in *Bivens* is a matter of principled discretion rather than constitutional compulsion. (Br. Pet. p. 22):

> At least in the absence of a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr, supra*, 369 U.S. at 217, 82 S.Ct. at 710, we presume that justiciable constitutional rights are to be enforced through the Courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Davis, 99 S.Ct. at 2275. *See also, Bivens*, 403 U.S. at 401-04 (Harlan, J., concurring).

Given the fundamental rights involved here, this Court must demand an absolute showing, devoid of all conjecture and speculations, that the FTCA was intended by Congress to be exclusive and that such remedy is in fact equally effective to protect these particular rights.

II.

THE FEDERAL TORT CLAIMS ACT DOES NOT PROVIDE A CONSTITUTIONALLY ADEQUATE REMEDY FOR THE REDRESS OF PLAINTIFF'S CLAIMS.

The Defendants argue that the Federal Tort Claims Act (FTCA) provides a "comprehensive" remedy for the constitutional violations alleged in this case (Pet. Br. p. 16, 32, 40); that this remedy is "more effective" than that afforded under the Constitution; that it provides "full relief for victims of unlawful official conduct"; and that a *Bivens* remedy is therefore "redundant." (Pet. Br. 32, 37). They further claim that the FTCA affords a "careful and thorough remedial scheme," and that the "comprehensive administrative and judicial procedures provided by the FTCA constitute an adequate Federal remedy . . . . " (Pet. Br. 20). This argument is completely refuted by a careful examination of the FTCA, when applied to Plaintiff's claims under the Fifth and Eighth Amendments.

As argued above, Plaintiff has not pleaded a malpractice claim against Bureau of Prisons officials, but rather claims arising directly under the Constitution.

[16]*See Butz v. Economou*, 438 U.S. 478, 565 (1978). *Cf., Robertson v. Wegmann*, 436 U.S. 584, 592 (1978); *Carey v. Piphus*, 435 U.S. 247, 257 (1978).

Defendants, in attempting to make the FTCA applicable here, repeatedly misstate her claim, as they must; for it is obvious that the FTCA was neither intended by Congress to cover claims under the Fifth and Eighth Amendments, nor does it offer an adequate remedy to those who have such constitutional claims.

The most compelling evidence of the inadequacy of the FTCA is found when the Plaintiff's claim is examined under Indiana State law, the law of the local forum, as required under the Act, 28 U.S.C. 1236(B), for her claim would abate in its entirety. Ind. Code Ann. §34-1-1-1. This would be true for all persons who die as a direct result of unconstitutional acts by government officials in the State of Indiana. Defendants not only neglect to address this reality, but attempt to distort in in a footnote by erroneously claiming that the Plaintiff's claim under Indiana law would be limited to medical and burial expenses, rather than abating completely. (Pet. Br. p. 27)[17] It is therefore starkly evident that Plaintiff and others like her in Indiana would have either no remedy whatsoever or, even accepting the Defendants' unsupportable argument, at most a woefully inadequate remedy, under the FTCA.

Apart from this fatal inadequacy, the FTCA provides an insufficient remedy for all Eighth Amendment claims which arise from "deliberate indifference" to medical needs, as well as for constitutional claims in general. As this Court has stated, the purposes of a constitutional

[17]The Government reaches this conclusion by attempting to apply a combination of the Indiana Wrongful Death Statute and the Indiana Survival Statute, an attempt which is wholly unsupportable, as the Court of Appeals held below, and which is more fully demonstrated in Argument IV, *infra*.

action under *Bivens* are to fully compensate the victim, to deter like conduct in the future, and to provide uniform application of federal law. *Bivens; Davis; Robertson v. Wegman* at 590-591; *Carey v. Piphus; Monroe v. Pape*, 365 U.S. 167 (1961).

By barring the award of punitive damages and by removing the personal liability of the law enforcement wrongdoer, the FTCA severely undercuts the goal of deterrence embodied in *Bivens* actions. The Act also restricts the ability of the victim to obtain full compensation for his injury by removing his right to elect a jury trial; by affording the Government not only all the defenses available to the individual wrongdoers but also extending immunity to acts otherwise actionable under the Constitution; and by placing the requirement of useless exhaustion as a barrier to suit. Further, requiring that a plaintiff bring her constitutional claim under the FTCA removes the power and special considerations afforded to protections of constitutional rights. Public policy requires that a constitutional claim be given great deference, that a victim's claim under the Constitution be facilitated, and that her remedy be jealously guarded by the courts to insure its adequacy. Finally, the need for the policy of uniform application of federal law is underscored by the abatement of Plaintiff's claim under application of the FTCA here.

A. The FTCA fails to provide for meaningful deterrence of unconstitutional acts of federal officials.

The Defendants contend that suit under the FTCA would "lead to greater deterrence of constitutional violations." (Pet. Br. p. 40) In fact, the opposite is true. A basic cornerstone of deterrence is found in the concept of individual liability, especially where the wrongdoer has violated the Constitution. As Justice White has said:

"It should hardly need stating that ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct." *Imbler v. Pachtman,* 424 U.S. 409 (1976); *see also, Monroe v. Pape.* This principle has been applied equally by the Court to situations where the claim arises directly under the Constitution against federal officials, and those arising under 42 U.S.C. §1983 against state officials. *Butz v. Economou.* In *Butz,* this Court, rejecting the government's pleas for absolute immunity for federal officials who violate constitutional rights, strongly reaffirmed the importance of personal liability to punish unconstitutional wrongdoing. *Butz,* 438 U.S. at 495, 501.[18] As Chief Justice Story has written, personal accountability for misconduct is

> founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of but without any authority, or by an excess of his authority, or by a negligent use or abuse of his authority. Where a person is clothed with authority, as a public agent, it cannot be presumed that the government means to justify, or even to excuse, his violations of his own proper duty, under color of authority.

J. Story, *Commentaries on Agency,* §308 (5th ed. 1857).

Significantly, it is the government and its Bureau of Prisons officials who stand before this Court as defendants and brazenly state that deterrence would be better

[18] Additionally, in *Monell v. Department of Social Services,* 436 U.S. 658 (1978), this Court again recognized the importance of personal liability in constitutional claims, by refusing to permit the use of agency principles to hold a municipality liable under 42 U.S.C. §1983, absent a municipal policy which caused the deprivation.

served if the Plaintiff sued under FTCA. This is the same government who must now defend numerous suits where high government officials are charged with gross constitutional violations which have arisen out of Watergate, FBI and CIA abuses, abhorrent prison conditions, and massive attempts to "cover up" the violations themselves.[19] If these claims are relegated to suit under the FTCA, which has no disciplinary mechanism, there is little or no chance of deterrence of such acts. If these federal agents are placed in no danger of being personally sued, brought to trial, found liable for their acts, or made financially responsible for their victims, it is hard to imagine how deterrence will be accomplished. The government asks us to trust the head of the agency to properly discipline the wrongdoers and to adopt "corrective" policies. In many circumstances, however, the head of the agency, or his trusted aides, are implicated in the unconstitutional acts complained of; and in prison setting, moreover, there is a long history of the Bureau of Prisons' refusal to voluntarily correct unconstitutional practices or to admit to their existence.[20] One need go no further than this case, where one of the defendants sued–Norman Carlson– is the head of the Bureau of Prisons.

[19] *See, e.g., United States v. Nixon,* 418 U.S. 478 (1974); *Halperin v. Kissinger,* ___ F.2d ___ No. 77-2015 (D.C.Cir. July 16, 1979); *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979); *Adams v. Carlson,* 488 F.2d 619 (7th Cir. 1973); Senate Select Committee on Government Operations With Respect of Intelligence Activities, U.S. Senate Final Reports, Books 1-6; Hearings Vo. 1-7.

[20] *See, e.g.,* the seven-year legal struggle concerning the Segregation/Control Unit at the Marion Federal Penitentiary which is still being litigated. *Adams v. Carlson,* 488 F.2d 619 (7th Cir. 1973); 375 F.Supp. 1228 (E.D.Ill. 1973); 368 F.Supp. 1050 (E.D.Ill. 1973); *Bono v. Saxbe,* 450 F.Supp. 934, 462 F.Supp. 146 (E.D.Ill. 1978); *see also* the history of a *Bivens* damage suit which arose from the same proceedings, *Chapman v. Kleindeinst,* 506 F.2d 1246 (7th Cir. 1974); *Chapman v. Pickett,* 586 F.2d 22 (7th Cir. 1978).

Contrary to its assertions in its brief, the government's real position on deterrence under the present FTCA is more truthfully set forth by former Attorney General Bell's own words:

> If civil liability of Federal employees is removed, however, I recognize that some sort of mechanism should be established to insure the fair and effective disciplining of a Government employee who has violated a citizen's constitutional rights. This bill would not affect such as employee's liability under the criminal law, but criminal liability alone is not a complete system of accountability.
>
> To this end, I am personally agreeable to provisions which would assure effective and fair procedures to discipline an employee who has violated another's constitutional rights, procedures in which the injured person can participate in a meaningful way. We understand, however, the administration is considering such new procedures.

Statement of Griffin B. Bell, on S. 2117, Jan. 26, 1978, pp. 4-5. While Plaintiff does not concede that such disciplinary procedures would in fact supply sufficient alternative deterrence to that guaranteed by personal liability under *Bivens*, the Act as it now stands contains no disciplinary procedures whatsoever, making the absence of meaningful deterrence even more apparent.[21]

The award of punitive damages for egregious constitutional harm in proper cases is another important

[21] The government also inconsistently argues that personal liability against federal agents dampens their "ardor" to perform their duties. The very real effect of personal liability is to dampen their ardor to perform unconstitutional acts while they perform their duties. To claim that it would have an adverse effect on the performance of lawful duties is, as Justice Brennan has written, "a gossamer web self spun without a scintilla of support to which one can point." *Barr v. Matteo*, 360 U.S. 564, 590 (1959) (Brennan, J., dissenting).

component of deterrence which is expressly unavailable under the FTCA's purported "comprehensive remedial scheme." 28 U.S.C. 2674. An award of punitive damages in a proper case[22] has an important deterrent effect not only in curbing future malicious conduct by the federal agent held responsible, but also stands as an example to other officials who may contemplate violating a citizen's constitutional rights.

In this case, the Plaintiff has sought punitive damages for the Defendants' alleged deprivation of her decedent's Fifth and Eighth Amendment rights. The nature of these claims, if proven, would strongly support an award of punitive damages,[23] yet under FTCA such an award is barred. Further, an award of punitive damages is especially important to deterrence in those cases where the victim may not have suffered significant compensable

[22] Awards of punitive damages are made as a matter of course in appropriate circumstances under 42 U.S.C. §1983 for deterrence, and this Court has affirmed such use of punitives. *Carey v. Phiphus*, 435 U.S. 247, at 257 n. 11 (1978); *Spence v. Staras*, 507 F.2d 554, 558 (7th Cir. 1974); *Basista v. Weir*, 340 F.2d at 87, 88 (3d Cir. 1965); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979) ($200,000); *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) ($61,000); *Fiedler v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) ($29,000). *See also, Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979); *Morrow v. Ingleburger*, 584 F.2d 767 (6th Cir. 1978); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976); *Mansell v. Saunders*, 372 F.2d 573 (5th Cir. 1967). *See also, Adickes v. S.H. Kress Co.*, 398 U.S. 144, 233-34 (Brennan, J., concurring in part and dissenting in part). Under the rule of *Butz*, punitives should be equally employed in *Bivens* actions, as they are in §1983 claims.

[23] Compare the "deliberate indifference" standard in *Estelle* with Prosser's "deliberate disregard of the interest of others," standard for punitive damages, in *Prosser Law of Torts* §2 at p. 10 (4th Ed. 1971). *See also, Devitt and Blackmar*, Civil Jury Instructions.

damages, but the constitutional violation was nonetheless extreme in nature. *Basista v. Weir, Zarcone v. Perry, Spence v. Staras.* In such a circumstance, the importance of deterring the violation in the future is almost entirely dependent on the *personal* liability of the individual agent for punitive damages. So again the FTCA remedy so patronizingly offered by the government is adequate neither in redressing Plaintiff's claims, nor in redressing constitutional claims in general.

The remedy provided by the FTCA, therefore, completely fails to satisfy an important underlying purpose of constitutional actions, that of deterrence. To entrust this critical component of *Bivens* actions to the FTCA would, in effect, place federal agents above the law, a concept entirely alien to the principles of the Constitution. As this Court stated long ago:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1882).

B. The FTCA fails to provide Plaintiff a meaningful opportunity for the full compensation of her constitutional claims.

The Defendants, in arguing that the Plaintiff has an "adequate alternative remedy," must also necessarily establish that she and others like her are afforded at least an equally complete, effective and comprehensive opportunity for full compensation, as she would be afforded under a *Bivens* claim. *Robertson v. Wegmann.* This, of course, cannot be sustained in Plaintiff's case, as her claim would completely abate if brought under the

FTCA. As a matter of general rule, however, Eighth Amendment and other constitutional claims are afforded a markedly less complete and adequate opportunity to obtain proper compensation under the FTCA than they would be under *Bivens.*

First, under the FTCA the victim is not permitted to elect trial by jury. This right, guaranteed by the Seventh Amendment, is extremely significant where the claim is constitutional in scope and the defendants are government officials. This right has been guaranteed in civil rights actions and, without doubt, is likewise guaranteed in *Bivens* claims. See *Curtis v. Loether*, 415 U.S. 189 (1974); *Richard v. Smoltich*, 359 F. Supp. 9 (N.D. Ill. 1963); *see also, Butz v. Economou.*[24] The jury's function is to act as the ultimate sovereign, and as a buffer between the government and the victim. The Defendants conjecture (Pet. Br. at 38) that juries have been reluctant to find for plaintiffs under *Bivens*. If true, this alleged bias applies equally where a judge sits as the trier of fact. The result in either case reflects the inherent bias of the legal and political system in favor of government officials and against the poor and dispossessed. Moreover, a victim may perceive a judge as more hostile to her claim because of his shared governmental employment with the defendants. In any event, the victim has the right to make a

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[24] *See also, Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) (right to jury trial under §4 of the Clayton Act); *Dairy Queen v. Wood,* 369 U.S. 469 (1962) (right to jury trial in damage action for trademark infringement).

reasoned choice whether to procede to trial with a jury or rest her fate with a judge. *Cf. Bell v. Hood*, 327 U.S. 678, 681 (1946).[25]

Another way that the Act inhibits full compensation is to afford the government additional defenses and greater immunity than those provided to a *Bivens* defendant. Under the Act, the Government is provided all of the defenses which would be afforded to the individual agent,[26] 28 U.S.C. 2674, and the government is given absolute immunity from suit if its agents performed a discretionary function, such as planning an unconstitutional act, 28 U.S.C. 2679(a), *Dalehite v. United States*, 346 U.S. 15, 42 (1953), or if the unconstitutional act was done pursuant to statute or regulation, 28 U.S.C. 2680(a). In these two circumstances, which are becoming all too frequent,[27] the government would completely escape liability, and their acts would go completely undeterred, even though this Court has already expressly refused to extend absolute immunity to unconstitutional acts by law enforcement officials. *Butz v. Economou.*

[25]There are many considerations in a plaintiff's determination of whether to proceed by bench or jury. The nature of the claim, the reputation of the judge, the geographic area from which the venue is selected, the nature of the damages, and the expectation that a jury will in most circumstances bring back a larger award, are some of the more obvious examples.

[26]The significance of this as a restriction on an FTCA litigant's ability to properly pursue a constitutional claim under the Act was recognized by Griffin Bell, who pointed out in his testimony before Congress that the new proposed amendments to the FTCA would not permit the raising of these defenses. Statement of Griffin Bell on S. 2117, January 26, 1978.

[27]For example, federal agents who knowingly participated in the planning of an unconstitutional act which was performed exclusively by state agents, would arguably be immune under FTCA. Additionally, many of the unconstitutional abuses under the FBI's Cointelpro program were done pursuant to express written instruction from high Bureau officials; these instructions, the government would no doubt argue, have the same effect as a regulation. The higher officials, according to this argument, would be immune as performing a discretionary, planning function, and the agents who performed the unconstitutional acts would likewise be immune as acting pursuant to regulation.

Another limitation on a plaintiff's ability under the Act to seek full compensation and which directly conflicts with the policy of facilitating redress for constitutional wrongs, is the Act's requirement that the plaintiff first exhaust her administrative remedies by filing a claim with the agency whose agents allegedly perpetrated the injury. 28 U.S.C. §2675. The Act neither sets standards nor establishes a mechanism by which the agency is to investigate, adjudicate or determine the monetary value of the claim. Further, administrative exhaustion within the Bureau of Prisons by a federal prisoner is all but a useless act, especially here, where one of the main defendants, Director Norman Carlson, would have to, in effect, concede his own culpability in order to settle the claim. More generally, the relative positions of a prisoner and his jailer, and the high level of mutual distrust and hostility between these two adversaries, makes meaningful administrative redress extremely unlikely, an unfortunate reality which is reflected in almost every prisoner case decided in the past fifteen years. In keeping with the policy of facilitating constitutional claims, and to avoid requiring such useless acts, this Court has held that exhaustion is not necessary under 42 U.S.C. §1983. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961); *McNeese v. Board of Education*, 373 U.S. 668, 672-6 (1963). No meaningful distinction can logically be drawn between a §1983 claim and one under *Bivens* which would support a different principle concerning exhaustion, so the same principles no doubt apply to *Bivens* claims, with equal force and affect. *Butz*, 438 U.S. at 500, 504.

In derogation of this constitutional principle, Defendants argue that a *Bivens* claim is "especially inappropriate in this case because it would allow litigants to . . . avoid administrative procedures," (Pet. Br. 29-30), and that these procedures would be beneficial by "keeping numerous ['frivolous'] cases out of the courts." (Pet. Br. 39, 40) It is pure speculation that such administrative procedures will weed out frivolous suits; in fact, it is more likely on balance that meritorious claims will be eliminated, especially in a prison setting where there is a real probability than an uneducated prisoner, unrepresented by counsel, will fail to meet the exhaustion requirements, despite having a meritorious claim.[28] As this Court recognized in *Butz*, the Federal Courts, by proper use of dismissal, summary judgment, and the "firm application of the Federal Rules of Civil Procedure, will ensure that federal officials are not harassed by frivolous law suits." *Butz v. Economou*, 438 U.S. at 507-8. And as Justice Harlan said in *Bivens:*

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

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[28]As to "weeding out" meritorious claims by administrative settlement, the lack of administrative standards, prisoner/agency hostility, and the unwillingness of prison officials to admit wrongdoing, as discussed above, make the realities of this *de minimus.*

Bivens, 403 U.S. at 411 (Harlan, J., concurring). An administrative exhaustion requirement, therefore, obstructs a plaintiff's ability to obtain full compensation, and frustrates the policies which underly this Court's removal of exhaustion requirements for constitutional claims. Further, by requiring the Plaintiff to bring her fundamental constitutional claim under a statutory tort theory her claim is stripped of its legal and moral strength, which is supplied by the Constitution; for a plaintiff armed with a cause of action protected by the Bill of Rights presents a case with more force and substance and thus has a greater likelihood of recovery.[29]

The above arguments make it clear that the opportunity for full and effective compensation to redress Plaintiff's claims is severely limited under the Act, which therefore does not provide either this Plaintiff or others who seek to redress their Eighth Amendment claims with an equally effective remedy.[30]

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[29]The constitutional cloak cannot be minimized in the pretrial stages, either, as the issues raised in pretrial discovery, such as privilege, would in all likelihood be determined more favorably to the victim against the backdrop of the constitution. *See, e.g., Gill v. Manuel*, 488 F.2d 799 (9th Cir. 1973); *Wood v. Brier*, 54 FRD 7 (E.D. Wisc. 1972); *Rosee v. Board of Trade*, 36 FRD 684 (N.D. Ill. 1964).

[30]In addition to the reasons stated above, the Act also prohibits the recovery of pre-judgment interest which is recoverable under a constitutional *Bivens* action. *See, Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979). Also, the Act's failure to provide for punitive damages limits full compenstation for constitutional deprivations, since such harm does not always lend itself to strictly compensable money damages, and often punitive damages is a manner by which the trier of fact can fully redress a violation of a fundamental right.

C. Application of the FTCA to Plaintiff's claim frustrates the policy of uniform application of the federal laws to vindicate constitutional rights.

Plaintiff's claim presents a compelling example of the need for uniform application of the federal law of liability and remedies to the unconstitutional conduct of federal officials, and demonstrates how that goal would be defeated by resort to a "common law tort" action under the FTCA. This case involves no state interests such that application of uniform federal rules would offend any notions of federalism. At issue here is the liability of federal agents at a federal prison for the unconstitutional deprivation of the life of a federal prisoner. "Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the state where the injury occurs." *Bivens*, 403 U.S. at 409 (Harlan, Jr., concurring). Further, as this Court said in *Davis v. Passman* at 2277, fn. 23:

> Deference to state court adjudication in a case such as this would in any event not serve the purposes of federalism, since it involves the application of the Fifth Amendment to a federal officer in the course of his federal duties. It is therefore particularly appropriate that a federal court be the forum in which a damage remedy be awarded.

This strong presumption that the liability of federal officials should not be tied to the "vagaries of common-law actions" would be defeated by application of the FTCA to Plaintiff's constitutional claim. The Act treats the government as a private person and determines liability according to the place where the misconduct occurred.

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government . . . under circumstances *where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

28 U.S.C. §1346(b) (emphasis supplied). *See also, Richards v. United States*, 369 U.S. 1 (1962).

This choice of law provision, repeated throughout the Act, *see* 28 U.S.C. §2672, would defeat the goal of uniformity of treatment of federal officials while gaining nothing in return.

> As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard* the Illinois statute permitted survival of the *Bivens* action. The liability of federal agents should not depend upon where the violation occurred.

Green v. Carlson, 581 F.2d 669, 674-75 (7th Cir. 1978) (Pet. App. 13a) Compare, *Robertson v. Wegmann.*

The government again seeks a result which was firmly rejected by this Court in *Bivens*, "to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different fron the relationship between two private citizens." *Bivens*, 403 U.S. at 391-92. The rights guaranteed by the Fifth and Eighth

Amendments are independent limitations upon the exercise of federal power and are not, nor should they be, tied to the peculiarities of the local common law. *Bivens*, 403 U.S. at 393-94. *See also, Monroe v. Pape*, 365 U.S. 167, 183 (1961). As Justice Harlan has stated,

> . . . a deprivation of constitutional rights is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy, even though the same act may constitute both a state tort and the deprivation of a constitutional right.

Monroe, 365 U.S. at 196.

Here, the application of the FTCA would not only reduce the Plaintiff's claim to a state common law tort and promote inconsistent and hostile determinations among Indiana and the other states, but would also extinguish her claim completely. Such a result clearly demonstrates why uniformity must be promoted where constitutional claims are at stake and why the failure to do so would completely defeat an adequate remedy.

* * *

Plaintiff's remedy under the FTCA, even if it does not completely abate, is completely inadequate,[31] for it

[31]The Defendants, in arguing that the FTCA is adequate here, place much reliance on this Court's decision in *Brown v. G.S.A.*, 425 U.S. 820 (1976). *Brown* is not only inapposite to this case, but in fact supports the Plaintiff's position. In *Brown* the Court found that Congress intended §717 of Title VII of the Civil Rights Act of 1964 to be the exclusive preemptive remedy for government employees who allege employment discrimination. As this Court recognized in *Brown*, §717 provides a comprehensive administrative and judicial remedy. Unlike the FTCA, Title VII specifically guarantees redress of the unconstitutional wrong, rather than miscasting the claim as a tort. Further, it provides for comprehensive administrative procedures, including a hearing before the neutral

[footnote continued]

provides neither full opportunity for compensation nor proper deterrence for the unconstitutional wrong. Additionally, application of the FTCA defeats the policy of uniform application of the federal law, and robs her claim of its constitutional power and strength. The Defendants' arguments must therefore be rejected.

III.

CONGRESS DID NOT INTEND TO INCLUDE CONSTITUTIONAL CLAIMS SUCH AS THOSE BROUGHT BY THE PLAINTIFF WITHIN THE AMBIT OF THE FTCA, NOR DID IT INTEND TO MAKE THE FTCA THE EXCLUSIVE REMEDY FOR ANY CONSITUTIONAL CLAIM.

The Court in *Bivens* was careful to point out that the absence of affirmative expression by Congress of the creation of an exclusive and equally effective remedy for violation of constitutionally protected rights was a critical factor in its recognition of a damage remedy directly under the Constitution. As the Court said,

> the present case involves no special factors counselling hesitation in the absence of affirmative action by Congress . . . [W]e cannot accept respondents' formulation of the question as whether the avail-

Civil Service Commission. As importantly, it firmly established a cause of action against federal defendants, grounded in the Fifth Amendment, where no clear remedy previously existed, thereby encouraging redress of constitutional violations under a statute which had already been subject to much constitutional interpretation in suits against state and private defendants.

In contrast, the FTCA offers no real administrative remedy; its judicial remedy is completely inadequate; there is a preexisting adequate remedy under *Bivens;* and relegation to the Act completely strips Plaintiff's claim of its constitutional protections, thrust and integrity, as well as its constitutional precedent, which had been developed in *Bivens* and 42 U.S.C. 1983 claims since this Court's decision in *Monroe v. Pape.*

> ability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

Bivens, 403 U.S. at 396-97.

The requirement that Congress must intend its remedy to be exclusive and equally effective was reiterated last term in *Davis v. Passman*, where the Court held that the failure of Congress to provide a remedy for "unconstitutional federal employment discrimination" did not constitute the "'*explicit* Congressional'" declaration referred to in *Bivens* and did not foreclose a judicially created remedy. *Id.*, ___ U.S. at ___, 99 S.Ct. at 2277-78, quoting *Bivens*, 403 U.S. at 397. (emphasis in original).

Thus, in this case, absent an explicit congressional declaration that the Plaintiff must be remitted to some other remedy, she may recover for the estate of Joseph Jones, as his administratrix, money damages for the unconstitutional federal deprivation of life.

The Federal Tort Claims Act was not intended by Congress to be an exclusive remedy for the kind of official lawlessness and serious constitutional deprivation alleged here. First, the statute itself reveals that "whenever Congress intended to make the FTCA remedy the exclusive remedy it has done so explicitly." *Hernandez v. Lattimore*, ___ F. 2d ___, No. 78-2098 (2d Cir., June 2, 1979) (slip op., p. 2898). Congress has declared the Act to be the exclusive remedy in cases arising from the negligent operation of motor vehicles by federal employees, 28 U.S.C. 2679; in cases involving the malpractice of certain government physicians, 38 U.S.C. 4116, 42 U.S.C. 233, 2458(a), 22 U.S.C. 817, U.S.C. 1089; and in cases involving the manufacturers of swine flu vaccine, 42 U.S.C. 247(b). The fact that Congress has specifically refused[32] to extend exclusivity to other kinds of cases is compelling evidence that the Congress did not intend the FTCA to be the exclusive remedy in all other cases, including ones involving deliberate indifference to serious medical needs, constituting cruel and unusual punishment.

In the 1974 amendments to the Act, Congress for the first time made the Act applicable to certain intentional torts of federal law enforcement officials. The amendment of §2680(h) of the Act provides that an aggrieved individual shall be able to maintain an action against the United States for "[a]ny claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" caused by the act or omissions of "investigative or law enforcement officers of the United States Government." On its face, the amendment does not apply to the type of claims Plaintiff has asserted here—death resulting from deliberate indifference to serious medical needs and racial discrimination by federal prison officials resulting in the denial of equal protection. Moreover, regardless of any specific applicability to the constitutional claims here, the 1974 amendments demonstrate the clear congressional intent to make the FTCA action *supplemental* to a *Bivens* action.

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[32] See the discussion below on recent unsuccessful attempts by the Department of Justice to lobby Congress to amend the FTCA to make it the exclusive remedy for "constitutional torts." S. 3314, 95th Cong. 2d Sess. (1978). *See also*, S. 695, 96th Cong. 1st sess. (1979); H.R. 2659, 96th Cong. 1st Sess. (1979).

> [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, *will have a cause of action against the individual Federal agents and the Federal Government.* Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progenty[sic], in that it waives the defense of sovereign immunity so as *to make the Government independently liable in damages for the same type of conduct* that is alleged to have occured in *Bivens* (and for which that cases imposes liability upon the individual Government officials involved).

S. Rep. No. 93-588, 93d Cong, 2d Sess., reprinted in (1974) U.S. Code Cong. & Admin. News, p. 2791 (emphasis supplied).[33]

The Senate Committee Report[34] clearly demonstrates a congressional intent to preserve the *Bivens* remedy, while creating an additional remedy, "coterminous with the liability of [Government] agents under *Bivens.*" *Norton v. United States,* 581 F.2d at 393, to be exercised at

[33] All courts which have had occasion to interpret the 1974 amendments are in full agreement with the position asserted by the Plaintiff. *Hernandez v. Lattimore, supra; Norton v. United States,* 581 F.2d 390, 395 (4th Cir. 1978). Additionally, in *Thornwell v. United States,* 471 F.Supp. 344 (D.D.C. 1979), the Court held that a discharged serviceman's complaint alleging the Army covered up LSD experiments performed upon him while on active duty and the consequent failure to provide follow-up examinations and treatment stated a claim against the United States and individual Army officials under the Fifth Amendment due process clause. The Court considered the impact of the 1974 amendments on the plaintiff's *Bivens*-type claim and concluded that they ". . . show that Congress plainly intended to permit Bivens and the Federal Tort Claims Act suits to exist side by side." *Id.* at 355.

[34] It is a well accepted principle of statutory interpretation that a court may resort to extrinsic sources to determine the objective of legislation. One of those extrinsic sources is the legislative history of the statute under consideration. Within the context of legislative history, it is a general principle that the reports of standing legislative committees represent "the most persuasive indicia of congressional intent", *United States v. Homestake Mining,* 595 F.2d 421, 428 (8th Cir. 1979); *Housing Authority of the City of Omaha v. United States Housing Authority,* 468 F.2d 1 (8th Cir. 1972), cert denied, 410 U.S. 927 (1973). *See also, Zuber v. Allen,* 396 U.S. 168, 186 (1969); *United States v. O'Brien,* 391 U.S. 367, 385 (1968); *Northern States Power Co. v. State of Minnesota,* 447 F.2d 1143, 1152 (8th Cir. 1971), *aff'd without opinion,* 405 U.S. 1035 (1972). The Supreme Court has stated that a committe report "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen,* 396 U.S. at 186. Such a reort is therefore of great value in determining congressional intent.

[footnote continued]

the plaintiff's option. This legislative history of the 1974 amendments reflects Congress' basic understanding of the differences between a *Bivens* action and the FTCA, differences which the Defendants ignore.

The FTCA does not preempt *Bivens* because they address different kinds of wrongs. The FTCA provides a remedial scheme to redress common law torts, *United States v. Muniz,* 374 U.S. 150 (1963), while a *Bivens* remedy redresses violations of constitutionally protected interests which give rise to federal question jurisdiction under 28 U.S.C. §1331. In addition to the racial discrimination claim, which even the Defendant fails to argue is congizable under the FTCA, Plaintiff alleges a cruel and unusual punishment claim of intentional indifference to serious medical needs; both claims qualitatively different than a claim of negligent medical malpractice. *See, e.g., Estelle v. Gamble,* 429 U.S. 97 (1976).

This Court must also consider the acknowledgment by the Department of Justice that the FTCA is not an exclusive remedy in suits to vindicate transgressions of consti-

tutionally protected interests. This acknowledgement is evidenced by its sponsorship of legislation in several prior sessions of Congress to make the FTCA an exclusive remedy. Presently pending before Congress are proposed acts styled "A bill to amend Title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts."[35] Senate Bill 695, 96th Cong., 1st Sess. (1979); H.R. 2659, 96th Cong., 1st Sess. (1979). The proposed amendment to 28 U.S.C. §2679 declares that

> [t]he remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment and for such claims arising under the Constitution . . . is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose act or omission gave rise to the claim, or against the estate of such employee.

S. 695, 96th Cong., 1st Sess. Sec. 6 (1979).

Several unsuccessful attempts have been made to amend the FTCA to make it the exclusive remedy in

[35]The former Attorney General, Griffin B. Bell, in his testimony in support of S. 2117, which contained exclusivity provisions similar to that contained in S. 695, has conceded that the FTCA is not now an exclusive remedy for violations by federal employees of constitutionally protected interests.. *Amendments to the Federal Tort Claims Act': Joint Hearing on S. 2117 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, United States Senate, 95th Cong., 2d Sess. (1978).

"constitutional tort" cases, the first coming as early as 1973, prior to the 1974 amendments to the Act. See, S. 3314, 95th Cong., 1st Sess. (1973); H.R. 10439, 93rd Cong., 1st Sess. (1973). Each of these proposed bills, sponsored by the Justice Department, would have provided for the exclusivity of remedy now sought by the government in the current session of Congress. Each time Congress has chosen not to extend "exclusivity" to constitutional violations. In fact, the one time it amended the FTCA it explicitly made it supplemental to a *Bivens* remedy.

This consistent rejection by Congress of attempts to amend the FTCA to make it the exclusive remedy for violations of constitutionally protected interests represents a recognition by Congress that the Act could not effectively provide as full and as adequate a remedy as is available under the Constitution.[36]

The *entire* legislative history, the prior decisional law, and an analysis of the act itself, clearly demonstrates that Congress did not intend to make the Act apply to Plaintiff's claims, let alone to make it the exclusive remedy, and thereby preclude relief directly under the Constitution.

[36]This Court has given consideration to the fact that a legislative body has considered and rejected an amendment to legislation. *See, Fox v. Standard Oil Co.*, 294 U.S. 87 (1934).

IV.

THE COURT OF APPEALS PROPERLY CREATED A FEDERAL COMMON LAW OF SURVIVAL IN THIS CASE BECAUSE DEATH WAS CAUSED BY THE UNCONSTITUTIONAL CONDUCT OF FEDERAL OFFICIALS AND THE RELEVANT STATE LAW WOULD ABATE THE ACTION.

The Defendants attack as an "unprecedented free-wheeling rule" (Pet. Br. at 41) the creation by the Court of Appeals of a federal common law of survival, when the Indiana survival statute would abate the Plaintiff's action against the Defendants. They incredulously assert that this statute, *Ind. Code Ann.* §34-1-1-1, under which no claim survives where death is caused by the conduct complained of, does "not frustrate the purposes of compensation and deterrence underlying the creation of constitutional damage actions." (Pet. Br. at 49)

The Defendants' assertion that "[u]nder Indiana law . . ., all causes of actions survive" (Pet. Br. at 14) is belied by an examination of the statute itself, as well as decisions interpreting the statute. As Plaintiff will demonstrate below, the Indiana survival statute is not only inconsistent, but totally repugnant to the policy underlying the *Bivens*-type action here which alleges serious violations of Fifth and Eighth Amendment rights. The Court of Appeals below gave the Indiana statute due consideration. The Court's decision to reject application of the statute and to create a federal common law of survival is consistent with well established policies which mandate full vindication for the deprivation of constitutional rights. The result reached below should be affirmed by this Court.

A. *Where federally protected rights have been invaded, the federal common law should govern the question of survival of the right of action.*

Even though the Court of Appeals rejected application of state law, it felt constrained to analyze the Indiana survival law for its possible application. To reach the Indiana statute, the Court utilized 42 U.S.C. §1988, as interpreted by this Court in *Robertson v. Wegmann*, because, in its view, "actions brought under the civil rights acts and those of the *Bivens*-type cases are conceptually identical and further the same policies, . . ." (Pet. App. 8a) Although Plaintiff agress with the result reached by the Court of Appeals, she submits that, by its own language, resort to §1988 is not statutorily required here. Plaintiff's decedent was a federal prisoner, incarcerated in a federal enclave and harmed by the unconstitutional conduct of federal officials. No state action or interest is even remotely involved, and no adverse effect on any state policy or interest can flow from the result in this case. It simply is not necessary for federal courts to engage in a piecemeal, case-by-case analysis of state law where a purely federal situation is involved.

This conclusion is fully supported by the Court's decision in *Bivens*, where great emphasis was placed on the need for an independent, uniform federal remedy where violations of constitutional rights occur. In *Bivens*, this Court unequivocably found that the Fourth Amendment "operates as a limitation upon the exercise of federal power regardless of whether the state in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." *Bivens*, 403 U.S. at 392. As Justice Harlan cogently summarized:

> . . . the limitations on state remedies for violation of common law rights by private citizens argue in

favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind. . . . *See Monroe v. Pape*, 365 U.S. 167, 195 (1961) (Harlan, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability . . . [citations omitted]. Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers depencent on the state where the injury occurs. *Cf. United States v. Standard Oil Co.*, 332 U.S. 301, 305-311 (1947).

Bivens, 403 U.S. at 409 (Harlan, J., concurring).[37]

Plaintiff submits that where the relationship between the parties to the action is distinctively federal in character, no resort need be made to state law. Support for this approach is found in *United Stated v. Standard Oil Co.*, 332 U.S. 301 (1947), where this Court rejected the application of state law to determine whether the govern-

[37]More recently, this Court refused to be bound by state common law tort rules of damages in analogous §1983 cases. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court rejected the assertion that denials of procedural due process were not compensable and held that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.* at 266. After analyzing the federal interests involved, and without any specific discussion of the applicable state law, the Court said:

> The purpose of §1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.

Carey, 435 U.S. at 258.

ment had the right to indemnification for injuries suffered by a member of the armed forces. Where the ". . . scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority," 332 U.S. at 305-306, no purpose would be served by applying state law to matters which are essentially federal in nature. In *Standard Oil,* no reason existed why the government's right to indemnification "should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines." 332 U.S. at 310. This reasoning certainly applies with great force and effect to the facts of this case.

> The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. It should also be noted that because federal prison authorities decide the prison where a prisoner is incarcerated, those authorities in a sense choose the state in which the wrong occurs.

(Pet. App. 13a)[38]

Although there is no general federal statute governing the survivability of constitutional claims, there is a growing body of decisional law determining when claims survive. Much of the modern impetus for this development comes from *Moragne v. State Marine Lines, Inc.*,

[38]The three states which make up the Seventh Circuit, wherein this case arose, have four federal prisons within their boundaries, and all have different survival statutes. *See, Ind. Code Ann.* §34-1-1-1 (Burns); *Ill Rev. Stat.* Ch. 3 §339 (Smith-Hurd); and *Wisc. Stat. Ann.* §895.01 (West). Any rules this Court fashions on survival must take into account the thousands of federal prisoners who must pass through these four institutions yearly.

398 U.S. 375 (1970). There the plaintiff brought an action for wrongful death against the owner of a ship on which her deceased husband had been employed, based on unseaworthiness. Neither federal statute nor the law of Florida, the forum state, provided for such an action. Moreover, in *The Harrisburg*, 119 U.S. 119 (1886), the Court had specifically held that maritime law does not afford a cause of action for wrongful death.

In *Moragne*, the Court overruled *The Harrisburg*, and held that an action for wrongful death does lie under general maritime law. In so doing, the Court observed that since *The Harrisburg* there had been a proliferation of wrongful death statutes under federal and state law, and noted that,

> [t]hese numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a federal refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law . . . .

Moragne, 398 U.S. at 390-91.

While *Moragne* concerned actions for wrongful death (damages to the surviving dependents or next of kin of the decedent), and this action concerns survival of the claim the decedent could have brought had he lived, the case stands for the proposition that creation of remedies allowing for survival of claims is not limited to statute. Other federal courts have followed its lead in survival

actions. In *Spiller v. Thomas M. Lowe, Jr. and Associates, Inc.*, 466 F.2d 903 (8th Cir. 1972), an admiralty suit based on negligence and unseaworthiness, the defendant claimed that recovery should be denied because no survival provision is included in the Death of a High Seas Act, 46 U.S.C. §761-768. The Eighth Circuit rejected defendant's claim, holding that "*Moragne* provides the foundation for recognizing the federal right that an action for pain and suffering survives the death of the injured party." 466 F.2d at 911.

Similarly, in *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974), the Court, in affirming an award for the decedent's pain and suffering, found that:

> . . . the policy enunciated by the Supreme Court in *Moragne* provides ample support for us to hold that there is a federal maritime survival action, created by decisional law, for pain and suffering prior to death. This conclusion comports well with the philosophy of *Moragne*, in that it remedies the non-existence of a federal cause of action and thereby avoids the problem of making plaintiff's recovery turn on the existence of a state survival statute . . . .

Barbe v. Drummond, 407 F.2d at 799.

Likewise, the instant case provides this Court the opportunity to decide that in constitutional damage actions against federal officials, where no state interests are even remotely implicated, the claim will survive for the benefit of the decedent's estate, regardless what the law of the forum state may provide.

B. The Indiana survival statute is inconsistent and inhospitable with the policy underlying this *Bivens*-type action and was properly rejected by the Court of Appeals in favor of a federal common law of survival.

Should resort be made to state law in fashioning a federal rule on survival in this case, the ultimate result must still allow survival of Plaintiff's claims. The most analogous area applicable to this case is the decisional law that has evolved under 42 U.S.C. §1988. *Robertson v. Wegmann*, 436 U.S. 584 (1978). Although recognizing that "the instant action involves a *Bivens*-type claim" and that §1988 thus had "no statutory effect,"[39] (Pet. App. 8a), the Court of Appeals below nonetheless applied §1988 to this case. What law governs the survival of a constitutional damage action, as the Defendants concede (Pet. Br. at 42), is unequivocally a question of federal law which must serve federal interests. *Robertson*, 436 U.S. at 588; *Burks v. Lasker*, ___ U.S. ___, 99 S.Ct. 1831, 1836 (1979). Where a federal question is involved, resort to state law may be appropriate in rare

[39]The Court below applied *Robertson* to the case at bar because *Bivens*-type actions and actions pursuant to the Civil Rights Act are conceptually identical and further the same policies. The Court also noted that other courts have "looked to the Civil Rights Acts and their decisional gloss for guidance in filling the gaps left open in *Bivens*-type actions." (Pet. App. 9a). *See also, Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert denied*, 438 U.S. 907 (1978); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975).

This Court applied the same reasoning in *Butz v. Economou*, 438 U.S. 478 (1978), wherein it stated: "[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under §1983." *Id.* 435 U.S. at 500.

circumstances. *Burks v. Lasker; United States v. Kimbell Foods, Inc.*, ___ U.S. ___, 99 S.Ct. 1448 (1979); 42 U.S.C. §1988. However, whether pursuant to statute or decisional law, where importation of state law would be *inconsistent or inhospitable with the federal policy* underlying the right in question, it must be *rejected.*[40]

This is not the test the Defendants would have this Court apply. They seek a rule that the federal courts should slavishly follow the law of the forum state "unless

[40]The Defendants place great reliance on decisions involving statutes of limitation. This argument, however, misses its mark. Whether it be survival or limitation statutes, the critical inquiry remains whether the importation of state law would be consistent with the federal right at issue. Thus, in *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), this Court, in ruling that a California statute of limitations did not apply to time-bar an action alleging a violation of Title VII, 42 U.S.C. §2000e, et seq., held that the borrowing of state rules was conditional on that rule being consistent with the federal right at stake. "(I)t is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Id.*, at 367. *See also, Beard v. Robinson*, 563 F.2d 331, 334 (7th Cir. 1977).

The Defendants argument also ignores a crucial difference between these statutes. Statutes of limitation provide some assurance that a defendant will not be held to answer a claim based on conduct long past. Survival statutes, however, serve no interest in repose; abatement arbitrarily cuts off all opportunity to redress injury rather than punishing one for sitting on his rights.

International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), on which Defendants place principal reliance, does not support application of the Indiana survival statute to this case. As *Hoosier* demonstrates, where application of the state law would frustrate, ". . . the achievement of any significant goal . . .", *id.*, 383 U.S. at 709, which underlies the federal rights at issue in the litigation, the federal courts may borrow that state law. However, where importation of the state law would, as here, totally frustrate the policies of deterrence, compensation, and uniformity which underlie constitutional damage actions, by abating the action, the state law must be rejected.

application of local law would *utterly* defeat the federal interests involved." (Pet. Br. at 42)[41] (emphasis supplied) This position should not be adopted by this Court, for it is not merely inconsistent with the federal policy underlying a *Bivens*-type action, but would, in the words of the Defendants, "utterly defeat" that policy. Such a result finds no support in decisions interpreting 42 U.S.C. §1988 or the Rules of Decision Act, 28 U.S.C. §1652.[42] The Defendants first assert that *Robertson*

[41] Put differently, the Defendants argue that "a court is justified in creating federal common law in this area only in the *extraordinary circumstance* that application of the state survival statute would *wholly frustrate* the institutional interests involved in a *Bivens*-type suit." (Pet. Br. at 41) (emphasis supplied)

[42] The Defendants argue that adoption of the Indiana survival statute as the law of this case "is strongly supported, if not compelled, by the Rules of Decision Act, 28 U.S.C. 1652." (Pet. Br. at 45) This conclusion misstates the effect that statute has on this case and is not supported by decisions of this Court. In *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942), the Court stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.

317 U.S. at 176.

As demonstrated *infra*, the same factors are analyzed and the same result reached under the Rules of Decision Act and §1988. This Court must consider whether there is a need for a national uniform body of law to apply in like situations, whether the application of state law would frustrate any federal policy or interest underlying the federal rights in question, and whether any danger exists of interference with some state policy. *Burks v. Lasker; United States v. Kimbell Foods, Inc.; Wilson v. Omaha Indian Tribe*, ___ U.S. ___, 99 S.Ct. 914 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Bivens; Textile*

[footnote continued]

"settles the proposition that state survival laws generally govern constitutional damages actions *against federal officials."* (Pet. Br. at 45). "[N]onetheless," they conclude, *Robertson* "is not dispositive of this case." (Pet. Br. at 47) In fact, *Robertson*[43] fully supports the Plaintiff's position.

In *Robertson*, the plaintiff, Clay Shaw, filed an action under 42 U.S.C. §1983 against several defendants claiming bad faith prosecution. After commencement of the litigation, but before trial, the plaintiff died. After the executor of Shaw's estate was substituted as plaintiff, the defendants moved for dismissal on the ground that the cause abated with Shaw's death. The District Court and the Court of Appeals found that federal common law

Workers v. Lincoln Mills, 353 U.S. 448 (1957); *United States v. Standard Oil Co.; Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *See generally*, Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512 (1969).

Because Plaintiff considers these factors in conjunction with her argument concerning §1988, which clearly is the most closely analogous area, she will not separately argue under the Rules of Decision Act. Suffice it to say that given the federal policy underlying this *Bivens*-type action, applying a state survival statute that would abate all actions for personal injuries where death resulted from the conduct complained of would completely subvert that policy. Although a state statute cannot be considered inconsistent merely because the Plaintiff may lose the litigation, where a whole class of litigants would be thwarted, the state statute must be rejected as hostile to federal policy.

[43] In *Robertson*, this Court, recognizing that in certain areas federal law will be silent or insufficient to furnish suitable remedies, turned to 42 U.S.C. §1988 for guidance in fashioning the remedial rule. Section 1988 provides that when federal law is deficient as a suitable remedy, "the common law, as modified and changed by the constitution and statutes of the [forum] state" shall govern "so long as the same is not inconsistent with the Constitution and laws of the United States."

allowed for survival even though the Louisiana law of survival would have abated the action.

This Court reversed. It found that absent a claim that a state survival law is "generally inconsistent" with federal policy or interest by failing to provide for survival of a significant class of tort actions. and absent a situation where the "deprivation of federal rights caused death," *id.* at 594, "the mere fact of abatement of a particular lawsuit is not sufficient ground to declare state law 'inconsistent' with federal law." *Id.* at 594-95.

There are several crucial distinctions between *Robertson* and the case which support the result reached by the Court below that importation of state law would frustrate the policy embodied in the federal rights at issue here. The first is that the state law of survival in *Robertson* was more hospitable to and consistent with the nature of the federal right being protected. In that case, the Louisiana law generally permitted the type of action maintained by Shaw's executor to survive. It abated only because Shaw was not outlived by any of the statutorily designated kin.[44] This Court was careful to state, however, that "[a] different situation might well be presented . . . if state law did not provide for survival or any tort actions . . . or if it significantly restricted the types of action that survive." *Robertson*, 436 U.S. at 494. As an examination of the Indiana survival statute

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[44]Indeed, the claim of the Plaintiff in this case would have survived had it been brought in Louisiana. As this Court noted in *Robertson*, 436 U.S. at 591:

> In actions other than those for damage to property, however, Louisiana does not allow the deceased's personal representative to be substituted as a plaintiff; rather, the action survives only in favor of a spouse, children, *parents* or siblings. (emphasis supplied)

reveals, and as the Court of Appeals correctly concluded below, this proviso in *Robertson* applies here.

The proper reading of the Indiana survival statute, *Ind. Code Ann.* §34-1-1-1, is that causes of actions for personal injuries to the deceased survive, to the limited extent so provided, only when that person "thereafter dies from causes *other* than personal injuries so received." Here, the decedent is alleged to have died as a *direct* and *proximate* result of the acts of the Defendants. Therefore, the limited survival exception for personal injury actions under the Indiana statute does not apply to the facts of this case. If the statute were controlling, it would not merely limit the amount of recovery, as Defendants contend; rather, it would *abate* the action entirely.[45] Indiana decisional law is in accord with Plaintiff's interpretation of the Indiana statute. *See, Methodist Hospital v Town & Country Mut. Ins. Co.*, 136 Ind. App. 184, 197 N.E.2d 773, reh. denied, 198 N.E.2d 873 (1964).[46] Thus, contrary to the Defendants' incorrect assertion, not "all tort claims survive to some extent" in Indiana. (Pet. Br. at 47)[47]

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[45]This fact was recognized by the Court of Appeals below. As Judge Swygert indicated, "the only cause of action for personal injury permitted to survive under Indiana law encompasses a factual situation different from that alleged in this case." (Pet. App. 9a, n.8)

[46]Just as they do in arguing the applicability of the Federal Tort Claims Act to this *Bivens*-type action, the Defendants ignore the harsh reality which flows from application of the Indiana survival statute. Under both arguments put forward by the government, the Plaintiff will be without a remedy for the death of Joseph Jones, Jr.. Basic principles of justice and "evolving standards of decency" certainly would be offended by this result. More importantly, those responsible for Joseph Jones' death will never have to answer for their unconstitutional conduct in this case. *See*, Argument II, *supra.*

[47]See also, 1 Ind. L. Encyc. §21, Survival of Causes of Action, pp. 21-23; *Allen v. Whitehall Pharmacal. Co.*, 115 F.Supp. 7, 8 (S.D.N.Y. 1953).

To avoid the harsh result occasioned by application of the Indiana survival statute, the Defendants incorrectly assert the application of the Indiana Wrongful Death Statute, *Ind. Code Ann.* §34-1-1-2. *See, e.g.*, Pet. Br. at 9 n. 6, 48-49. Their claim is that both statutes, taken together, permit the survival of all actions. This argument is disingenuous and is thoroughly contradicted by Indiana decisional law.

As the Indiana Supreme Court has stated, §34-1-1-2 is designed "to create a cause of action to provide a means by which those who have sustained a loss by reason of the death may be compensated." *Pickens v. Pickens*, 225 Ind. 119, 126, 263 N.E.2d 151, 155 (1970). Section 34-1-1-2 has no effect on those actions the decedent's estate may bring for personal injuries to the decedent; it grants compensation to certain designated persons who were dependent and suffered a pecuniary loss from the decedent's death. The action is created in favor of the decedent's personal representative and is brought for the exclusive benefit of dependent widow, widower, children or next of kin. *Shipley v. Daly*, 196 Ind. 443, 20 N.E.2d 653 (1939); *Hilliker v. Citizens' Street Railroad Co.*, 152 Ind. 86, 62 N.E. 607 (1899). The statute is not a remedy for the victim. *Bocek v. Interr-Ins. Exch. of Chicago Motor Club*, 369 N.E.2d 1093, 1096 (Ind. App 1977).[48]

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[48]The present Wrongful Death Statute in the State of Indiana was originally contained in §784 of the Civil Code as adopted by the first Indiana legislature in 1852. (2 Rev. St. 1876, p. 309) Prior to the enactment of the Civil Code, a cause of action for an injury to a person died with that person. The passage of §784 was not an attempt to revive a person's cause of action for the injury suffered. The statute created a new cause of action against a tortfeasor for wrongfully causing the death of another. Any

[footnote continued]

The Defendants, however, misapply the wrongful death statute and then misconstrue Plaintiff's suit as an attempt to seek "windfall relief." (Pet. Br. at 49)[49] This, of course, runs afoul of the plain meaning of the Plaintiff's complaint. (App. 7-14) This is not a case of dependent survivor making a claim for pecuniary loss of support, but rather the estate of one who was deprived of fundamental human rights seeking redress for that death in the form of money damages.[50]

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action to recover damages for the injury to the decedent would be a distinct and separate action. This conclusion was reached by the Indiana Supreme Court in a case involving a wrongful death action against a railroad company. *Jeffersonville Railroad Co. v. Swayne's Administrator*, 26 INd. 477 (1866).

In another case involving a wrongful death action against a railroad, *Burns v. Grand Rapids and Indiana Railroad Co.*, 113 Ind. 169, 15 N.E. 230 (1888), the Indiana Supreme Court reiterated that §784 of the Civil Code did not revive the cause of action for personal injury to the decedent, but rather created a new cause of action in favor of the heirs or next of kin. "The recovery is not a penalty inflicted by way of punishment for the wrong, but is merely compensatory of the damages sustained by the heirs or next of kin, who had, or are supposed to have had, a pecuniary interest in the life of the intestate." 113 Ind. at 171. *See also, Louisville, N.A. & C. Ry. Co. v. Goodykoontz*, 119 Ind. 111, 21 N.E. 472 (1889).

[49]Defendants' arguments (Pet. Br. at 49) that some federal statutes, *e.g.*, 5 U.S.C. §8133(a), 33 U.S.C. §909, and 42 U.S.C. §1986, limit the amount of recovery as well as who may recover, are based on a wrongful death analysis and are, thus, inapplicable to this case.

[50]The Court of Appeals' rejection of application of the Indiana survival statute and the Court's fashioning of a federal common law of survival is bottomed on a correct understanding of both the nature of the Plaintiff's action and a proper interpretation of state law. As the Court below stated:

> It is important, however, to characterize plaintiff's complaint properly. The district court erred in its characterization. The

[footnote continued]

The Indiana statutory scheme for survival clearly offends the federal policy that underlies *Bivens* actions. As the Court stated in *Robertson*, "[t]he policies underlying §1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson*, 436 U.S. 590-91. These policies are equally applicable to a *Bivens* action, and it can hardly be denied that these policies are totally subverted by a statutory scheme which abates all claims where the unconstitutional conduct complained of is the *direct* and *proximate* cause of death. For this Court to hold that there can *never* be a civil rights or *Bivens* action brought in Indiana where death results from the official abuse or power would be to cheapen the very value of life itself. Allowing recovery for injury but denying relief for death would be a ghoulish mockery of the Bill of Rights and would place in the hands of prison officials the power to inflict punishment without fear of retribution. "Such a holding would not only fail to effectuate the policy of allowing complete vindication of constitutional rights; it would subvert that policy." (Pet. App. 12a)

The Court in *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961) was faced with an argument similar to Defendants' in an action brought by a surviving widow against various Georgia police officers for the illegal arrest and fatal beating of the decedent. Rejecting the defendant's contention that the civil rights statutes reflect a

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plaintiff is suing neither for deprivation of another's constitutional rights nor on an independent statutorily created cause of action for wrongful death. Rather, she is asserting her son's cause of action as the administrator of his estate.

Pet. App. 6a, n. 4.

purpose that actions under those statutes shall not survive, Judge Brown, for the Court, stated:

> [I]t defies history to conclude that Congress purposely meant to assure the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.

293 F.2d at 404.

Even assuming the Indiana statute is generally hospitable, its application here, where the unconstitutional conduct caused death, would defeat the goal of preventing the abuse of power by officials which underlies *Bivens* actions.[51] As this Court noted in *Robertson*, although allowing the claim therein to abate, "the fact

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[51] The Defendants' assertion that "state laws of survivorship simply do not affect or regulate primary daily activity" (Pet. Br. at 44) misses its mark. While it may be true that federal prison officials are not versed in the intricacies of the Indiana statutes, they are congizant, Plaintiff assumes, of the proscriptions contained in the Constitution, and are aware that they can be held individually liable for violations thereof. Should this threat of individual liability for death be removed, the goal of deterrence will be weakened. The consequence will surely be greater violations in the future. Abatement of all actions resulting in death is hardly an encouragement to remedy the deplorable conditions which, as here, were allegedly responsible for four deaths at the USP, Terre Haute, in seven months' time.

Additionally, "[i]nsuring a specific deterrent under federal law gains importance from the very premise of the Civil Rights Act tht state tort policy often is inadequate to deter violations of the constitutional rights of disfavored groups." *Robertson*, 436 U.S. at 600 (Blackman, J., dissenting).

that a particular action might abate surely would not adversely affect §1983's role in preventing official illegality, *at least in situations in which there is no claim that the illegality caused the plaintiff's death."* 436 U.S. at 592 (emphasis supplied). Deterrence, as argued above on the applicability of the FTCA to this case, is bottomed on personal accountability. To arbitrarily release the malefactor who kills from liability when he who maims must answer in a court of law would defeat the goal of deterrence.

The Defendants seek to support this anomolous result by arguing that because the law of survival has no common law analogue, "the courts are less able to fashion such rules." (Pet. Br. at 45) This argument is further evidence that the Defendants seek a revival of the discarded common law principle that "no civil action lies for an injury which results in . . . death." *Insurance Co. v. Brame,* 95 U.S. 754, 756 (1878). In *Moragne,* this Court discussed the viability of this concept, stating:

> One would except, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized every since its inception, and described in such terms as "barbarous." *E.g., Osborn v. Gilliett,* L.R. 8 Ex. 88, 94 (1873) (Lord Bramwell dissenting); F. Pollock *Law of Torts* 55 (Landon ed. 1951); 3 W. Holdsworth, *History of English Law* 676-677 (3d ed. 1927).

> Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter.

398 U.S. at 381; *See also, Bell v. Hood,* 327 U.S. 678, 684 (1946).

There is no rational distinction to be made between the dead and the living in the area of constitutional claims. *Brazier v. Cherry,* 293 F.2d at 404. As Mr. Justice Harlan stated in another context:

> Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-auctionable simply because it was serious enough to cause death.

Moragne, 398 U.S. at 381.

The fact that Joseph Jones, Jr. was killed by the unconstitutional conduct of these Defendants requires this Court to hold that this cause of action survives. Any other holding would encourage federal officials not to stop once they had injured someone, but to be certain to kill. As Chief Justice Marshall stated in the landmark case of *Marbury v. Madison,* 5 U.S. (I Cranch) 137, 163 (1803):

> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

CONCLUSION

The Defendants, accused here of serious unconstitutional acts causing death, urge upon this Court two related arguments which would totally eliminate Plaintiff's opportunity for any relief. Despite having never raised

it below, the Defendants create a broad anti-constitutional claim that the FTCA provides an "equally effective" remedy for Plaintiff and that this Court should preclude a remedy directly under the Constitution. Defendants make this contention in the face of the absolute abatement of the entire claim resulting from the Act's requirement that the Indiana survival statute be applied. Further, the Defendants, those who are charged with the wrongdoing here, have the audacity to tell the victim's administratrix that her right to a jury trial, punitive damages, and to enforce individual accountability against the wrongdoers, is not necessary to insure the full vindication of her constitutional claim. By the most disingenous and contorted reasoning, the Defendants would have Plaintiff's claims stripped of their constitutional power and reduced to mere negligent medical malpractice in order that they fit within the obvious limitations of the FTCA.

In its second argument, the Defendants pursue another theory devoid of merit which would again result in the total abatement of Plaintiff's claim. The Defendants argue that the Indiana wrongful death and survival statute be applied so that they may avoid liability for their wrongful acts.

If the fundamental protections contained in the Bill of Rights are to have any meaning, and if the goals of meaningful compensation and deterrence are to be achieved, Plaintiff must have the right to sue directly under the Constitution.

Failure to insure that a full and adequate remedy is available to Plaintiff and others who will follow will

only encourage further lawlessness and official misconduct, and denigrate the protections embodied in the Constitution. Wherefore, the Plaintiff urges this Court to affirm the judgment of the Court of Appeals in all respects.

Respectfully submitted,

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No. 78-1261

In the Supreme Court of the United States

OCTOBER TERM, 1979

NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., PETITIONERS

v.

MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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INDEX

CITATIONS

Page

Cases—(Continued):

Page

Constitution and statutes:

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1. In our opening brief (pages 15-24), we showed that where Congress has provided an adequate statutory remedy, there is no justification for the courts to create a constitutional damages action such as that recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Although respondent acknowledges that Congress may substitute a legislative remedy for constitutional damages actions, she claims (Br. 16-17) that, unless Congress has manifested an affirmative intent to make an available statutory remedy exclusive, the Constitution compels a judicially-implied cause of action.[1] This Court has repeatedly emphasized, however, that the existence

[1]The linchpin of respondent's argument is that *Bivens* actions are a matter of "constitutional compulsion" (Resp. Br. 16 n.15). But the Court's opinion in *Bivens* expressly rejects this notion. The Court weighed a number of considerations in implying a constitutional

of an effective federal statutory remedy, whether or not intended by Congress to be exclusive, may well eliminate the need for a *Bivens*-type remedy. See, *e.g.*, *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 19; *id.* at 1 (Powell, J., dissenting) (matter of "principled discretion"); *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 396-397; see also Comment, *Loe* v. *Armistead*: *The Availability of an Alternative Remedy as a Bar to Extending Bivens*, 20 Wm. & Mary L. Rev. 393 (1978).[2]

For example, the Civil Rights Acts, 42 U.S.C. 1981 *et seq.*, were enacted a century before this Court first implied a constitutional tort remedy in *Bivens*. Accordingly, the Congress that passed the Civil Rights Acts could hardly have intended those statutes to exclude an

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cause of action in that case, including "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. The Court recently reiterated these considerations in *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 16-20. Such considerations "would not be permissible, of course, were the *Bivens* result a constitutional necessity." *Molina* v. *Richardson*, 578 F. 2d 846, 850 (9th Cir. 1978).

[2]To be sure, where Congress has manifested an explicit intent to establish an exclusive remedy for particular kinds of complaints, the *Bivens* remedy is unavailable. See *Brown* v. *General Services Administration*, 425 U.S. 820 (1976). Indeed, if Congress enacts an exclusive remedy, *all* other remedies, including those provided by other federal statutes and state tort law, are preempted. The question posed here, however, is whether in the absence of such congressional intent, the Court is compelled to create a *Bivens*-type action. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979), slip op. 6-7. Respondent's discussion (Br. 37-39) of legislation now pending in Congress is therefore irrelevant. Even if the government is successful here, it will continue to support the proposed legislation because there are many constitutional torts that do not fall within the existing scope of the Federal Tort Claims Act and because an exclusive FTCA remedy would also preclude suits against federal officers based on state tort law or other federal statutes.

alternative damages remedy based directly on the Constitution—a remedy of which they were unaware. Nonetheless, the courts of appeals have consistently refused to recognize a constitutional damages action in those circumstances in which the Civil Rights Acts constitute an adequate statutory remedy. See, *e.g.*, *Turpin* v. *Mailet*, 591 F. 2d 426, 427 (2d Cir. 1979) (en banc) (42 U.S.C. 1983); *Molina* v. *Richardson*, 578 F. 2d 846, 850-853 (9th Cir. 1978) (42 U.S.C. 1983); *Mahone* v. *Waddle*, 564 F. 2d 1018, 1024-1025 (3d Cir. 1977) (42 U.S.C. 1981). See also *Monell* v. *Department of Social Services*, 436 U.S. 658, 712-713 (1978) (Powell, J., concurring). It is thus apparent that the availability of a *Bivens*-type remedy in a particular circumstance does not depend on Congress' intent to make an available statutory remedy exclusive, but rather is a matter of "principled discretion" for the courts, dependent upon the adequacy and comprehensiveness of the existing statutory remedy.[3]

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[3]Amicus Lawyers' Committee for Civil Rights Under Law contends (Amicus Br. 10-11 & n.11) that the Court should dismiss the writ in this case as improvidently granted. We note that respondent has not joined in this suggestion (see Resp. Br. 11 n.5). In any event, amicus is incorrect in its assertion that the government failed to raise the *Bivens* issue in *Moffitt* v. *Loe*, No. 78-1260, the Fourth Circuit case that is being held pending resolution of this case. The plaintiff in *Moffitt* v. *Loe* filed both a constitutional claim and a Federal Tort Claims Act suit, and the government's petition for rehearing in the court of appeals presented the precise theory discussed in point I of our opening brief. See Petition on Behalf of the Federal Appellees for Rehearing In Banc at 4-7, *Loe* v. *Armistead*, 582 F. 2d 1291 (4th Cir. 1978). Accordingly, the government did properly raise the *Bivens* issue "prior to the petition for certiorari." *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); see *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). (We are lodging a copy of the rehearihg petition in *Loe* with the Clerk of this Court.)

2. Respondent also raises several challenges to the adequacy of the Federal Tort Claims Act as an alternative statutory remedy. In essence, respondent asserts that because the remedy afforded by the FTCA differs in certain respects from the cause of action recognized in *Bivens*, and because the FTCA remedy nominally applies to "torts" rather than "constitutional violations," she is entitled to sue under either the FTCA or the Constitution, or both. The relevant question, however, is not whether the FTCA constitutes a remedy identical to that provided in *Bivens*, but whether the FTCA adequately compensates the victims of unlawful governmental conduct. Moreover, as a recent commentator has observed:

> By focusing on the right violated, the injury suffered tends to be overlooked. If that injury can be compensated within the existing remedial framework provided by Congress, then, accordingly, the violation of the victim's constitutional right has been redressed. To ignore this rationale would condone an entirely new set of judicially created collateral remedies, to the exclusion of those provided by Congress, because a constitutional right allegedly has been violated.

Comment, *supra*, 20 Wm. & Mary L. Rev. at 403 n.65. See also *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976) (characterizing constitutional damages actions under 42 U.S.C. 1983 as "a species of tort liability").

At least in the context presented here, the FTCA provides a comprehensive remedy obviating the need for the courts to imply another, redundant one. Every state allows suits for medical malpractice, and the Federal Tort Claims Act has long been construed to permit compensation for injuries such as those allegedly suffered

by respondent's son. See, *e.g.*, *United States* v. *Muniz*, 374 U.S. 150 (1963). Furthermore, as we demonstrate below, the differences between this statutory remedy and a *Bivens*-type action catalogued by respondent are insubstantial or nonexistent.[4]

First, respondent asserts (Br. 18) that "[t]he most compelling evidence of the inadequacy of the FTCA" is that Indiana law (as incorporated under the FTCA) would limit or abate her tort claim.[5] But the success or

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[4]In fact, a suit against the federal government based on a medical malpractice rationale is generally a far preferable remedy to a constitutional damages action against defendants such as prison guards, who may be judgment proof. See note 8, *infra*.

Respondent observes (Br. 10 n.4) that her complaint alleges that her son's death was the result of race discrimination, in violation of the Fifth Amendment, as well as deliberate indifference to serious medical needs, in violation of the Eighth Amendment (A. 12-13). Because the FTCA encompasses both prison medical malpractice (whatever the motivation) and the intentional torts of correctional officers, the statute appears to afford a remedy for respondent's particular equal protection claim. Of course, if an alleged constitutional tort does not fall within the scope of a federal remedial statute, then recognition of a *Bivens*-type action would ordinarily be appropriate. See *Davis* v. *Passman*, *supra*. In any event, the government's petition for a writ of certiorari expressly concerned only respondent's Eighth Amendment claim.

[5]Under Indiana law, all actions survive except personal injury actions in which the victim dies from the injuries inflicted. See Ind. Code Ann. § 34-1-1-1 (Burns 1973). As to such personal injury actions, Indiana instead provides a remedy for wrongful death. See Ind. Code Ann. § 34-1-1-2 (Burns 1973). The wrongful death action, although not technically a survival action, shares many of the same characteristics. See Note, *Wrongful Death Actions in Indiana*, 34 Ind. L.J. 108, 114-115 (1958); *In re Estate of Pickens*, 255 Ind. 119, 126-127, 263 N.E. 2d 151, 155-156 (1970); *City of Indianapolis* v. *Willis*, 208 Ind. 607, 613, 194 N.E. 343, 346 (1935). More important, it provides full compensation for tortious conduct causing death. Indeed, in many circumstances a wrongful death action may lead to a more favorable recovery. In personal injury cases in which the victim dies of causes other than the injury, the Indiana survival

failure of an individual suit is not an appropriate basis for extending the *Bivens* decision. Rather, as the Court's analysis in *Bivens* makes clear (403 U.S. at 394-397; *id.* at 407-410 (Harlan, J., concurring)), the critical inquiry is whether implication of a constitutional damages action is necessary to protect the class of claimants in question. See also *Davis* v. *Passman*, *supra*, slip op. 11 n.18. Because the FTCA fully covers in-prison medical malpractice whether or not such medical inattention also violates the Eighth Amendment, the fact that respondent's individual claim might fail is an insufficient reason for implying an additional constitutional cause of action. Moreover, as we have explained in point II of our opening brief, respondent's *Bivens* claim is in any

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statute allows the recovery of "only the reasonable medical, hospital and nursing expense and loss of income * * * from the date of the injury to the date of his death" (Section 34-1-1-1). In contrast, the Indiana wrongful death provision states that in most instances "damages shall be in such an amount as may be determined by the court or jury, including, *but not limited to*, reasonable medical, hospital, funeral and burial expenses and lost earnings" (Section 34-1-1-2) (emphasis supplied). Of course, where, as here, the decedent is not survived by a spouse, child or dependent relative, the wrongful death recovery is more limited.

Respondent contends that her lawsuit is a survival action governed solely by Section 34-1-1-1 and that therefore Indiana law defeats her claim completely. Respondent's complaint states, however, that this suit is brought both on behalf of her son's estate and also on behalf of respondent as next of kin (A. 7-8). In addition, under Indiana law an administratrix is the proper party to bring either a survival or a wrongful death action. See, *e.g.*, *Indiana State Highway Comm'n* v. *Speidel*, 392 N.E. 2d 1172, 1176 (Ind. Ct. App. 1979); *The Jeffersonville R.R.* v. *Swayne's Administrator*, 26 Ind. 477 (1866). In any event, so long as Indiana, like other states, provides a mechanism for the recovery of damages on account of death caused by unlawful behavior, it seems irrelevant to the issues posed by this case whether Indiana denominates such a claim as a survival action or a wrongful death action or whether respondent has chosen to forego an available avenue of relief.

event controlled by the same provisions of Indiana survival law that govern her suit under the Federal Tort Claims Act.

Second, respondent contends (Br. 22-26) that judicial implication of a *Bivens*-type remedy is warranted here because punitive damages and jury trials are unavailable in FTCA suits. The right to jury trial, however, relates merely to the procedure of adjudication, not to the fairness or completeness of the compensation that may ultimately be awarded to a successful litigant. Respondent does not, and could not, plausibly assert that all remedial schemes excluding the right to jury trial are inadequate.[6] Judges are empowered to render the same damages awards as juries.

By the same token, even assuming that punitive damages are available in *Bivens*-type actions,[7] they are not an essential attribute of an adequate compensation scheme. The primary purpose of a constitutional damages action is to compensate the victim of wrongful government conduct. See *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 397; *id.* at 407-408 (Harlan, J., concurring). An award of compensatory damages is,

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[6]Moreover, as we noted in our opening brief (pages 30-31 n.30), juries have exhibited substantial reluctance to award damages to prisoners in suits against government officials. See Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 788-809 (1979); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. Legis. 1, 2-3 (1979); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 456-457 (1978).

[7]Compare *Holodnak* v. *Avco Corp.*, 514 F. 2d 285, 292 (2d Cir.), cert. denied, 423 U.S. 892 (1975), with *Hanna* v. *Drobnick*, 514 F. 2d 393, 398 (6th Cir. 1975). See also *Carey* v. *Piphus*, 435 U.S. 247, 257 n.11 (1978) (reserving question whether punitive damages are available under 42 U.S.C. 1983).

by definition, sufficient to compensate a plaintiff for injuries caused by unlawful conduct, and there is no dispute that compensatory damages are fully available under the FTCA. "Punitive damages" on the other hand, " 'are not compensation for injury.' " *International Brotherhood of Electrical Workers* v. *Foust*, No. 78-38 (May 29, 1979), slip op. 6 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). A plaintiff has no constitutional right to obtain punitive damages, and Congress (or, absent congressional guidance, this Court) could eliminate that type of relief, even for constitutionally-based claims. See *International Brotherhood of Electrical Workers* v. *Foust*, *supra*, slip op. 10. Cf. *Lockerty* v. *Phillips*, 319 U.S. 182, 187-188 (1943). Hence, the absence of a punitive damages possibility does not render a compensation scheme inadequate as a matter of law.

Moreover, punitive damages are not essential as a means of deterring official misconduct. Compensatory damages have a substantial deterrent effect. As the Court recently remarked in *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978), "[t]o the extent that Congress intended that [damage] awards under [42 U.S.C.] 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." In addition, although under the FTCA it is the United States and not the misbehaving official that is named as the defendant and that would pay any adverse judgment, the individual wrongdoer does not escape without sanctions. It is the individual government employee's conduct that is the focus of the FTCA proceeding, and any employee whose conduct results in

damages liability for the United States faces the possibility of disciplinary action, including dismissal.[8]

Finally, respondent claims (Br. 27-29) that the defenses and administrative procedures set forth in the FTCA somehow prohibit "full compensation." But the due care and discretionary function defenses found in 28 U.S.C. 2680(a) are essentially equivalent to the qualified immunity defense that would be available in a *Bivens* action. See *Butz* v. *Economou*, 438 U.S. 478 (1978).[9] In

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[8]We explained in our opening brief (pages 37-41) that the substitution of governmental for individual liability often results in more significant long-term deterrence of misconduct. See *Turpin* v. *Mailet*, 579 F. 2d 152, 165 (2d Cir.) (en banc), vacated, 439 U.S. 974 (1978), modified on other grounds, 591 F. 2d 426 (1979); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 927 (1976). Indeed, contrary to respondent's assertion (Br. 21), we believe it is far more likely that government officials will acknowledge wrongdoing, settle lawsuits, and take vigorous corrective action when a suit implicates the liability of the government and not the finances of the officials themselves. See Newman, *supra*, 87 Yale L.J. at 457 ("Providing for suit directly against the * * * government would * * * enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence"). We also note that the possibility of punitive damages, whatever its efficacy in theory, is a "rather hollow remedy" in practice, both because it is rarely imposed and because many government officials could not satisfy a large judgment. See S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973); Comment, *supra*, 20 Wm. & Mary L. Rev. at 410-411.

[9]Respondent misconstrues (Br. 26) the scope of the two FTCA defenses. The government, like the individual defendants in a *Bivens* suit, is not liable where its agents exercise due care in following a statute or regulation. Moreover, although there may be circumstances outside of the prison medical malpractice context in which the discretionary function exemption would absolve the government of liability when an individual defendant would be held liable, no court has ever suggested that the discretionary function defense applies to the planning and execution of a program designed to deprive citizens of their rights. Respondent's exaggerated claim on this point simply ignores the 1974 amendments to the FTCA. See 28 U.S.C. 2680(h); S. Rep. No. 93-588, *supra*, at 2-3.

addition, the administrative claim requirement of the FTCA is hardly a "useless act" (Resp. Br. 27). As we discussed in our opening brief (pages 25-26 & n.23, 30 n.29), the legislative history of the FTCA clearly reflects Congress' considered view that the administrative claim procedure serves to lessen court congestion, to relieve the Department of Justice of defending against unnecessary litigation, and to mitigate the delays in settling meritorious claims equitably. Actual experience under the FTCA supports this congressional understanding. For example, we are informed that in the latest nine-month period, the north central region of the Bureau of Prisons (which includes Indiana) has settled 65 out of 158 FTCA claims at the administrative level.[10]

3. Respondent contends (Br. 41-43) that federal common law and not state law controls the survival of constitutional damages actions. However, respondent does not disclose the precise contours of this federal law, such as who may sue, who is entitled to share in the recovery, when suit must be brought following the decedent's death, or what monetary limits, if any, are imposed on recovery. Because these kinds of questions are more legislative than judicial in nature, and because such questions implicate traditional state law concerns, this Court has repeatedly declined to create such rules as a matter of federal common law and has instead adopted appropriate state law. See, *e.g.*, *Robertson* v. *Wegmann*, 436 U.S. 584 (1978); *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).[11] See also *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405-408 (1970).[12] There is no reason to depart from that salutary rule in this case.[13]

[10]Of course, as mentioned earlier (see note 8, *supra*), the government is far more likely to settle an FTCA claim prior to trial than is an individual officer named as a defendant in a *Bivens* action.

[11]It is noteworthy that respondent repeatedly urges the Court to treat constitutional damages actions as though Congress had extended 42 U.S.C. 1983 to cover federal officials (see, *e.g.*, Br. 20, 23, 27), yet she suggests that the even-handed rule adopted in *Robertson* v. *Wegmann*, *supra*, regarding the survival of Section 1983 actions is somehow inappropriate in the *Bivens* context.

[12]Respondent's extensive reliance (Br. 43-45, 56-57) on *Moragne* v. *States Marine Lines, Inc.*, *supra*, is misplaced. In that case, the Court held only that, as a matter of admiralty law, there is a common law wrongful death action available to the beneficiaries of long-shoremen killed while working aboard a vessel in the navigable waters of the United States. The Court strongly indicated, however, that, rather than creating the elements of this cause of action as a matter of federal common law, the federal courts should simply adopt existing state or federal statutes to supply the missing details, such as who may bring the action. See 398 U.S. at 405-408. The Court remarked that "[b]oth the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades." *Id.* at 408.

[13]Respondent's claims concerning the construction of Indiana law are addressed in note 5, *supra*. We further note that the Indiana statutory scheme is far from unique. Many states in addition to Indiana limit the cause of action for personal injuries causing death or replace it with a wrongful death action. See, *e.g.*, Ariz. Rev. Stat. Ann. § 14-3110 (1975); Cal. Prob. Code § 573 (West Cum. Supp. 1979); Fla. Stat. Ann. § 768.20 (West Cum. Supp. 1979); Ill. Ann. Stat. ch. 70, §§ 1 and 2 (Smith-Hurd 1959 and Cum. Supp. 1979) (*Baird* v. *Chicago, B. & Q. R.R.*, 11 Ill. App. 3d 264, 296 N.E. 2d 365 (1973)); Minn. Stat. Ann. §§ 573.01-573.02 (West Cum. Supp. 1978); Mo. Ann. Stat. § 537.020 (Vernon Cum. Supp. 1979); Neb. Rev. Stat. § 25-1402 (1975); Nev. Rev. Stat. § 41.100 (1977); N.Y. Est., Powers & Trusts Law § 11-3.3 (McKinney 1967); Va. Code § 8.01-25 (1977); W. Va. Code §§ 55-7-5 to 55-7-8a (1966 and Cum. Supp. 1978); Wyo. Stat. § 1-4-101 (1977).

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1261

NORMAN A. CARLSON, Director, Federal Bureau of Prisons, *et al.*,

Petitioners,

v.

MARIE GREEN, Administratrix of the Estate of Joseph Jones, Jr.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. AND THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AS AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF CONTENTS

CITATIONS

Statutes:

Legislative Materials:

Page

Other Authorities:

Page

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INTEREST OF AMICI

The American Civil Liberties Foundation, Inc. is the legal arm of the American Civil Liberties Union which is a nationwide non-partisan organization of over 200,000 members dedicated solely to the purpose of protecting the civil rights and liberties of Americans. Since 1920 its constant concern has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. *Amicus* has been concerned about the importance of protecting citizens' civil rights and liberties by impos-

ing sanctions against those officials who abuse their office or are indifferent to the rights they are supposed to serve.

The Legal Aid Society of the City of New York is a private organization which serves the legal needs of the poor in many ways, including their dealings with governmental agencies and personnel. The Society is greatly concerned with maintaining and strengthening individuals' remedies against violations of their rights by governmental action.

Amici have frequently appeared before the federal courts to support their historic role in remedying and deterring violations of federal civil rights and liberties. We submit this brief *amici curiae* to urge the Court to preserve the role of the federal courts in enforcing fidelity to constitutional guarantees on the part of government officials and employees.

SUMMARY OF ARGUMENT

The existence of a tort remedy against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671 *et seq.*, does not confer personal immunity on federal officers against civil suit for constitutional torts, and the FTCA is not an exclusive remedy in such cases. The *Bivens* action (see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)), like the counterpart damage action under 42 U.S.C. §1983, serves both a compensatory and a deterrent purpose. On this and other grounds, the Court in *Butz v. Economou*, 438 U.S. 478 (1978), recently refused to grant absolute immunity in constitutional cases to federal officers exercising executive discretion. The *Butz* decision—and its application in this case—is supported both by the long-standing tradition of our jurisprudence that individuals, particularly government officials, should be accountable for their misconduct, and by the specific need for deterrence of unlawful official acts. The Government's claim that exposure to

personal liability will "dampen the ardor" of officials in performing their rightful duties was fully acknowledged, and given its proper due, in the *Butz* Court's extension of a qualified immunity to federal officers, protecting them where the law is not clear and their actions are not malicious. Any possible deterrent effect of monetary sanctions against the Treasury may be nullified by the failure of highly placed officials to take strong steps to curb illegality in government, or by their own involvement in it.

This view is supported both by *Bivens* and by the language and structure of the FTCA. The Court in *Bivens* and in *Davis v. Passman*, ___ U.S. ___, 99 S.Ct. 2264 (1979), held that only an "explicit congressional declaration" that personal damage liability should not be avilable would preclude the courts from entertaining *Bivens* actions. The FTCA contains no such declaration; indeed, it strongly supports the continued availability of the *Bivens* remedy. First, Congress has specified by statute the types of cases in which the FTCA is intended to be the exclusive remedy; the present case, and constitutional torts in general, are not among them. It is generally understood that absent specific provision for exclusivity, other remedies are unaffected by the existence of the FTCA. Second, the relationship between the FTCA remedy and a suit against the individual officer is spelled out in 28 U.S.C. §2679; judgment under the FTCA is a complete bar to suit against the individual. Conversely, the absence of a judgment under the FTCA leaves open other remedies. Third, in the one instance where Congress has considered the relationship of the *Bivens* remedy and the FTCA—the 1974 amendments which extended the FTCA's coverage to certain intentional torts of federal law enforcement officials, 28 U.S.C. §2680(h)— a clear intent was expressed to permit the two remedies to coexist.

The government's claim that the FTCA constitutes a "comprehensive remedial scheme" for constitutional torts is plainly false and provides no reason for the Court to refuse to permit inference of a *Bivens* remedy in addition. The FTCA is neither "comprehensive" with re-

spect to constitutional torts, nor does it provide fully appropriate remedies for them. The FTCA is undoubtedly a comprehensive remedial scheme for common law torts of federal employees. However, its utility as a protector of constitutional rights is seriously limited, even in cases where a constitutional violation also may be pled as a common-law tort. First, there is no provision within the FTCA for deterrent sanctions; no action is prescribed against the offending individuals upon a finding of government liability, and neither punitive nor liquidated damages are permitted under the FTCA. Second, the interests protected by the common law of torts may be inconsistent or even hostile to the interests protected by constitutional provisions. Third, the relegation of FTCA claims to the law of the place where the tort occurred means that no coherent body of federal law may develop to govern federal officers. Their rights and obligations may vary from state to state—by contrast with state officers, who are governed by a body of federal law under 42 U.S.C. §1983 and the Constitution itself. Thus, federal officials in some states might be personally liable while their counterparts in other states would be personally immune for the same acts. Fourth, the FTCA's exceptions for discretionary functions and for acts performed pursuant to a statute or regulation might constitute defenses to many claims of serious constitutional violations. Fifth, there is no provision for jury trial. For all these reasons, in the absence of an explicit Congressional direction that the FTCA should be exclusive, the Court should not declare it the exclusive remedy in an area for which it was not designed and is poorly suited.

The government's position is doubly unjustifiable since Congress has explicitly rejected such a position and has demonstrated its understanding that a *Bivens* remedy exists in addition to that provided by the FTCA. In 1973, the government proposed legislation to create precisely the immunity and exclusivity it now seeks from the Court. The proposal was rejected. In 1977, new legislation was introduced to the same end. Under heavy criticism from Congress over its lack of individual accountability and other flaws, the bill was amended to

provide for an administrative disciplinary proceeding at the victim's behest and to meet other objections to the FTCA's shortcomings in constitutional cases—in short, to make the FTCA the comprehensive remedial scheme that it presently is not. This legislation has not been passed but is still pending.

Throughout the legislative debate it has been understood that the existence of the FTCA in no way precludes the availability of the *Bivens* remedy. The government's belated attempt to raise the exclusivity/immunity claim in this case and in *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978), *cert. pending sub nom. Moffit v. Loe*, No. 78-1260, represents not a good faith attempt to litigate a substantial issue but an attempt to bypass the serious concerns raised by Congress and to obtain from this Court the unqualified exclusivity and immunity that Congress has explicitly rejected.

ARGUMENT[1]

I

BOTH THE TRADITION OF PERSONAL ACCOUNTABILITY AND THE NEED FOR DETERRENCE AND ACCOUNTABILITY FOR OFFICIAL MISCONDUCT SUPPORT CONTINUED PERSONAL LIABILITY OF FEDERAL OFFICERS.

A. The Bivens remedy serves both compensatory and deterrent purposes when constitutional rights are violated.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that an unconstitutional arrest, search and seizure by federal law enforcement agents

[1] Although this brief confines itself to the merits of the question presented in Point I of the government's brief, we note that there is substantial doubt that the Court should reach the merits of that point. As the government ad-

gave rise to a federal cause of action for damages against the agents. The broad scope of the *Bivens* remedy was recognized in *Davis v. Passman*, ___ U.S. ___, 99 S.Ct. 2264 (1979), where, in upholding a claim of sex discrimination asserted under the Fifth Amendment, the Court declared, "At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' . . . we presume that justiciable constitutional rights are to be enforced through the courts." *Id.* at 2275.

Suits under the Constitution serve two purposes: to "provide . . . redress to the injured citizen" and to "deter federal officials from committing constitutional wrongs." *Butz v. Economou*, 438 U.S. 478, 505 (1978). The *Bivens* remedy is thus parallel in purpose to the statutory remedy under 42 U.S.C. §1983, which is widely recognized to serve deterrent as well as remedial purposes. *Robertson v. Wegmann*, 436 U.S. 584, 592 (1978) (majority opinion); *id.* at 599 (dissenting opinion); *Carey v. Piphus*, 435 U.S. 247, 257 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring)

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mits, Pet. Br. at 16, n. 19, the issue was not raised, briefed or passed upon by the Court of Appeals. This is hardly a case "where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result'" if the Court did not reach the merits of the newly raised argument. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations and footnotes omitted). Moreover, the pendency in Congress of legislation which would resolve the question presented while simultaneously making other significant changes in the Federal Tort Claims Act makes immediate decision by the Court doubly inappropriate. First, Congressional action may obviate the necessity for the Court ever to decide the question of FTCA exclusivity in constitutional cases. Second, as shown in Point II, *infra.*, it has been made clear in Congress that exclusivity will not be granted legislatively without other significant changes in the FTCA; for the Court to create that exclusivity judicially would permit the government to bypass Congress' extensive consideration and deliberation on these issues and would "judicially admit at the back door that which has been legislatively turned away at the front door." *Laird v. Nelms*, 406 U.S. 797, 802 (1972).

Amici fully endorse the contentions of the Lawyers Committee for Civil Rights Under Law in their *amicus* brief with respect to this issue.

("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which §1983 was enacted.")

Recognizing this parallel between the *Bivens* action and its counterpart under §1983, and the related perception that "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head," *Butz*, 438 U.S. at 504,[2] this Court rejected the government's contention that federal officials exercising executive discretion should be afforded absolute immunity. Instead, these officials were extended only the qualified immunity enjoyed by state officials under §1983. *Id.* at 496–504.

Despite the holding in *Butz*, the government now urges upon this Court that absolute immunity—this time not limited to executive officials—be granted to federal officials in all cases where the Federal Torts Claims Act provides some remedy against the United States. The government, absent any affirmative action from Congress and in spite of clear Congressional indications to the contrary, seeks to radically restrict the scope of the *Bivens* remedy and deny citizens the opportunity to hold government officials personally responsible for violations of constitutional rights. However, examination in light of the *Bivens* holding both of the public policy issues and the relevant Congressional action and inaction mandates rejection of the government's position.

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[2]More colloquially, former Attorney General Bell, then a Judge of the Court of Appeals for the Fifth Circuit, "objected to the notion that there should be 'one law for Athens and another for Rome.'" *Butz*, 438 U.S. at 499, n. 25, quoting *Anderson v. Nosser*, 438 F.2d 183, 205 (1971) (concurring opinion).

B. Policies of accountability and deterrence support the continued availability of a damage action against federal officials who violate the Constitution.

One of the most basic premises of Anglo-American jurisprudence is that individuals are responsible and accountable for their acts of misconduct. That premise has long been recognized to underlie our concepts of tort liability.[3] Tort law recognizes both the purpose of compensation and the purpose of prophylaxis—"that injuries are to be compensated, and anti-social behavior is to be discouraged." W. Prosser, *Law of Torts* §1 at 3 (4th ed. 1971).[4]

This tradition of personal accountability has extended to governmental officers as well as private persons. As this Court recently stated:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law. . . .
>
> * * *

[3]Actions against officials for violation of constitutional rights have been recognized to be "a species of tort liability," *Imbler*, 424 U.S. at 417, and tort principles have informed the jurisprudence of 42 U.S.C. §1983 in several important ways. See, e.g., *Imbler* (prosecutorial immunity); *Carey v. Piphus*, 435 U.S. 247 (1978) (damages); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity of officials); *Monroe v. Pape*, 365 U.S. 167, 187 (1961). These principles are as applicable under *Bivens* as under §1983.

[4]The development of *respondeat superior*, although it permits a master to be held liable for the wrongful acts of a servant, is not to the contrary, since it is not intended to immunize the actual malefactor from the consequences of tortious behavior. Rather, the purpose of the doctrine has merely been to provide a "deep pocket" from which a judgment may be satisfied so that the wronged party need not go uncompensated. Generally, the victim has been permitted to assert liability against either employee or employer or both. Harper and James, 2 *The Law of Torts* §26.1, at 1363 (1956). This principle has been preserved in the Federal Tort Claims Act itself except in certain narrowly defined situations. See Point II, *infra*.

> . . . . In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.
>
> —*Butz*, 438 U.S. at 506.

This view is deeply rooted in our legal tradition. Even under the English view of sovereign immunity, certain royal officials could be held liable in damages. "For, as a king cannot misuse his power, without the advice of evil counselors, and the assistance of wicked ministers, these men may be examined and punished." 1 W. Blackstone, *Commentaries*, *244; see also *id.*, Book I, ch. 9. In the United States, of course, official accountability was given added force. In cases of "positive torts," government officers

> incur the same personal responsibility, and to the same extent, as private agents. This is founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of, but without any authority, or by an excess of his authority, or by a negligent use or abuse of his authority. Where a person is clothed with authority, as a public agent, it cannot be presumed, that the government means to justify, or even to excuse, his violations of his own proper duty, under color of authority.
>
> —J. Story, *Commentaries on Agency* §320 (7th ed. 1869)[5]

[5]See also J. Story, *Commentaries on the Constitution* §1676 (3d ed. 1858) ("If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.")

Similarly, actions to vindicate constitutional violations by state or local officials are firmly founded on principles of personal accountability. In *Monroe*, 365 U.S. at 187, the Court stated that 42 U.S.C. §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Even in those limited circumstances where a municipality or other governmental body may be held liable, *respondeat superior* does not apply; liability may not be imposed "solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 692 (1978).

The reason for maintaining this personal liability of government officers–apart from compensation of the victim and the basic moral principle that all persons should be accountable for their wrongdoing–is to deter misconduct by these officers. This consideration has been cited by Prosser in opposition to the view "[a]t the other extreme" espoused by the government, that liability for public officers' torts should rest solely with the governments that employ them.

> . . . [I]t may seriously be questioned whether the removal of the possible deterrent effect of the individual's tort liability, at least for oppressive and outrageous conduct, would be at all a desirable thing. There once was a disreputable character named John Wilkes, whose newspaper was raided and put out of business, his premises illegally searched, and his property seized and confiscated, all for the worst kind of political motives. The tort actions which arose out of this high-handed piece of oppression were long regarded as a major blow struck for the freedom of the individual against the abuse of governmental power; and so long as cheap and conniving politicians continue to abuse that power, they should not be forgotten.
>
> –Prosser, *supra*, §132 at 992 (footnote omitted)

See also Berman, *The Need for an Integrated System of Governmental Tort Liability*, 77 Col.L.Rev. 1175, 1198-99 (1977).

The government's position on the policy issues of personal liability versus governmental liability and personal immunity rests on several questionable propositions. First, the government invokes the weary specter of the fear of judgments and the burden of litigation "dampen[ing] the ardor" of officials in the "unflinching discharge of their duties." Pet. Br. at 39, quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). Second, it assumes that the deterrent value of personal liability on improper conduct is outweighed by the supposed inhibition of officers in the proper performance of their jobs, and that the conflict must be resolved by choosing one or the other. Pet. Br. at 39–40.[6] Third, it claims that governmental liability as provided by the FTCA is at least as satisfactory a deterrent as is personal liability.

None of these arguments withstands scrutiny. The "dampened ardor" argument has been termed a "gossamer web self-spun without a scintilla of support to which one can point." *Barr v. Matteo*, 360 U.S. 564, 590 (1959) (Brennan, J. dissenting).[7] Questioned in Congress as to the existence of any "hard evidence that Federal employees have been inhibited in their proper activities by suits," then Attorney General Bell could offer only a "hard feeling that the FBI

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[6] Another argument, directed at the facts of this case, is that "lack of proper medical care for prisoners involves a systematic breakdown rendering individual liability less appropriate." Pet. Br. at 34. The government apparently believes that systems break down by magic or natural law rather than by the malfeasance or neglect of individuals. Suffice it to say that if the respondent proves "deliberate indifference to serious medical needs" on the part of any defendant, see *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976), individual liability will be highly appropriate.

[7] See also criticism of *Gregoire* in Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Officials*, 74 Harv. L.Rev. 44, 50, n. 24 (1960) and Becht, *The Absolute Privilege of the Executive in Defamation*, 15 Vand. L.Rev. 1127, 1166 n. 199 (1962).

agents were very worried about civil suits," coupled with an anecdote about two federal building inspectors sued for common law negligence–a risk no different from the risk of suit in private business. *Amendments to the Federal Torts Claims Act: S. 2117, S. 2868, S. 3314. Joint Hearings Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 23 (1978) (Statement of Griffin Bell) [Hereinafter *1978 Joint Senate Hearings*]. While this lack of empirical proof of what may be an ultimately untestable proposition does not prove that "dampened ardor" is nonexistent, the Court should not take on faith self-serving claims of its magnitude and seriousness by those who would like to be immunized.

The Government proceeds from this dubious premise to an altogether illogical conclusion when it assumes that the only acceptable response to "dampened ardor" is simply to grant absolute immunity to constitutional tortfeasors in its employ. In fact, there is a middle ground, which the Court found quite firm in *Butz*: extend to federal officials the qualified immunity enjoyed by state officials under 42 U.S.C. §1983. This doctrine preserves liability where official conduct is clearly unconstitutional or done with malice; however, it excuses acts done with innocent motive where the constitutional prohibition was not settled. This doctrine frees the officer from the necessity of predicting the course of future constitutional decision while preserving the obligation to be aware of settled law and to avoid malicious abuse of official power. Moreover, qualified immunity encourages the most satisfactory balance between the hypothetical "dampened ardor" and a lack of personal deterrence:

> . . . [T]he prospect of such suits has led Federal employees to seek guidance on their authority to engage in activities the constitutionality of which may be challenged. This pressure has given impetus to the

> legislative efforts to enact a charter for the FBI and CIA to define the limits of lawful activity.
>
> –124 Cong. Rec. S19484 (daily ed. Oct. 14, 1978) (remarks of Sen. Abourezk)

This protection from unjust liability does not, of course, eliminate the burden admittedly inherent in any litigation, regardless of the outcome. However, the fact that the United States provides counsel to defend these lawsuits removes the most serious burden of litigation; the courts have ways of screening out frivolous lawsuits, *see Bivens*, 403 U.S. at 410 (Harlan, J., concurring); *Butz*, 438 U.S. at 507; and even if the entire body of *Bivens* litigation were transformed into FTCA suits, the officials whose conduct was challenged would still be required to participate in discovery, serve as witnesses, and otherwise assist in the defense of the cases.

The government attempts to bolster its unconvincing argument by claiming that governmental liability constitutes an adequate deterrent for constitutional violations.[8] This too is unpersuasive. First, it is not at all clear how immunizing individuals while placing liability on the government would cause greater deterrence of improper conduct but less "dampened ardor." If executive officials are expected to fear for their careers if FTCA judgments are won, or to lose sleep over payments from the Treasury, or to be embarrassed by judgments under the FTCA or annoyed by participation in FTCA litigation, it

[8] Initially one must question the assignment of great deterrent value to a statutory scheme which explicitly forbids the award of punitive damages. 28 U.S.C. §2674. This statutory provision is especially problematical given the number of serious constitutional violations for which an award of compensatory damages could not be made or would not be large, see *Carey v. Piphus*, 435 U.S. at 266-67. Punitive damages have generally been held available under both §1983 and *Bivens*. Under §1983 see cases cited in *Carey v. Piphus*, 435 U.S. at 257, n. 11; see also *O'Connor v. Donaldson*, 422 U.S. 563, 572 (1975). Under *Bivens*, see *Paton v. La Prade*, 524 F.2d 862, 871-72 (3d Cir. 1975); *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975); *Alvarez v. Wilson*, 431 F.Supp. 136, 144 (N.D.Ill. 1977).

is difficult to see, under the government's theory, why they should not suffer "dampened ardor" in the form of overly cautious policy-making or overly restrictive supervision. Conversely, if they are not greatly affected by these events, it is difficult to see how they would be motivated to take "unflinching" action to curb illegality on the part of their subordinates.[9]

Moreover, common sense and recent experience raise grave doubts as to the efficacy of a deterrent directed only at the public fisc. The effectiveness of such a deterrent assumes first, that all officials in responsible positions are concerned about the disposition of public funds, and second, that all officials are both willing and able to take effective action to control illegal behavior in their agencies. One hopes, of course, that both of those premises are true; but realistically, they cannot be relied upon in every case.[10] Officials may see writing checks against the Treasury as a relatively painless way of buying off

[9]The claim that "there is substantial indication that imposing liability on the government alone . . . actually leads to greater deterrence of constitutional violations by forcing the promulgation of corrective policies," Pet. Br. at 40, falls when sources are examined. The actual language of the cited case is: "Moreover, a municipality is *arguably* in the best position to reduce the incidence of such behavior by promulgating corrective policies." *Turpin v. Mailet*, 579 F.2d 152, 165 (2d Cir. *en banc* 1978), *vacated and remanded*, 439 U.S. 974 (1978), *reinstated in part and remanded*, 591 F.2d 426 (2d Cir. 1979) (emphasis supplied). The cited law review article states, "The threat of monetary judgments against government units *may*, however, spur higher officials to design their hiring and training programs, disciplinary procedures, and internal rules so as to curb misconduct." Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 927 (1976) (footnote omitted) (emphasis supplied). Examination of the sources of these sources provides no greater certainty. To abolish the time-honored remedy of individual liability on this speculative basis would be unwise and unsound.

[10]For example, a rather different attitude both toward the unlawful acts of subordinates and toward the stewardship of other people's money is suggested by transcripts of a conversation on March 21, 1973 among then President Nixon and his counsel John Dean (later joined by aide H.R. Haldeman), in which they discussed unlawful surveillance and other improper activities which might be traced to the President's subordinates and the danger that certain individuals then in jail might reveal this damaging information unless large sums of money were made available to them.

> P–How much money do you need?
>
> D–I would say these people are going to cost a million dollars over the next two years.
>
> P–We could get that. On the money; if you need the money you could get that. You could get a million dollars. You could get it in cash. I know where it could be gotten.
>
> –*The White House Transcripts: Submission of Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon* (G. Gold ed. 1974) at 146–47.

Later, discussing the specific demand of E. Howard Hunt for $120,000, the President observed, ". . . [F]or your immediate things you have no choice but to come up with the 120,000, whatever it is. Right?" *Id.* at 172.

those who press complaints of illegality, while giving their attention and energies to other matters that they assign higher priorities, such as maintaining the "morale" of their subordinates. See, Bell, *Proposed Amendments to the Federal Torts Claim Act*, 16 Harv. J. of Leg. 1, 6 (1979). They may encourage or permit unconstitutional policies for ends they believe correct and accept judgments against the fisc as a cost of doing business. For that matter, they may themselves be involved in the unconstitutional behavior. Finally, they may be well-intentioned but unable, because of personal inadequacy, lack of information, or other reasons, to impose standards of lawful behavior upon their subordinates.

In any of these situations, recovery against the United States, while it would compensate the complaining party for any traditionally measurable damages suffered, see *Carey v. Piphus*, would not adequately

serve the interest of society in assuring that constitutional rights are "scrupulously observed," *Id.*, 435 U.S. at 266.[11]

II

NEITHER THE COURT'S HOLDING IN *BIVENS* NOR THE LANGUAGE AND STRUCTURE OF THE FEDERAL TORT CLAIMS ACT (FTCA) SUPPORTS THE VIEW THAT THE FTCA IS AN EXCLUSIVE REMEDY FOR CONSTITUTIONAL VIOLATIONS BY FEDERAL OFFICERS OR THAT THE *BIVENS* REMEDY SHOULD BE WITHHELD WHERE A SUIT LIES UNDER THE FTCA.

A. Because there is no explicit Congressional direction that the FTCA be an exclusive remedy in constitutional cases, the existence of the FTCA has no bearing on the availability of the Bivens remedy.

In *Bivens* the Court explicitly addressed the way in which Congressional action or inaction should be weighed:

> . . . the present case involves no special factors counseling hesitation in the absence of affirmative action by Congress. . . . [W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit

[11] Indeed, then Attorney General Bell conceded as much in explaining the absence of punitive damages under S.2117: "Since the victim's remedy will no longer be against the individual who wronged him, but rather against the government, the imposition of punitive damages would penalize only the taxpayer without serving any meaningful deterrent purpose." *1978 Joint Senate Hearings, supra*, 29 (Letter from Attorney General Bell to Vice President Mondale Sept. 19, 1977). Similarly, no "meaningful deterrent purpose" would be served by relegating the victim to a remedy that permits only compensatory damages.

> Congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.
>
> —*Bivens*, 403 U.S. at 396–97

This standard was reiterated in *Davis v. Passman.* There, the Court of Appeals had construed the failure of Congress to provide anti-discrimination remedies for Congressional employees as intended to bar such remedies. This Court held that this fact did not constitute the "'*explicit* Congressional declaration'" referred to in *Bivens* and that the Congressional inaction did not foreclose the judicially created remedy. ___ U.S. at ___, 99 SCt. at 2277, quoting *Bivens*, 403 U.S. at 397 (emphasis supplied by Court).[12] By the same token, where (as here) there is no explicit Congressional declaration that the victims of a constitutional violation may not recover from the responsible federal employee but must be remitted to the statutory cause of action against the government, there is no reason to restrict the presumptive availability of the *Bivens* remedy declared by the Court in *Davis v. Passman*, ___ U.S. at ___, 99 S.Ct. at 2277–78.

B. Congress did not intend to make the FTCA an exclusive remedy, or to immunize federal officers from personal liability, except in certain narrow circumstances not applicable here.

Under the *Bivens* standard, extensive canvassing of legislative intent with regard to the FTCA is not necessary absent an explicit declara-

[12] The *Davis* Court also held explicitly that the criteria of *Cort v. Ash*, 422 U.S. 66 (1975), for the inference of private causes of action from statutory rights, have no application to the *Bivens* remedy for constitutional infringements. ___ U.S. at ___, 99 S.Ct. at 2274-75.

tion that it is an exclusive remedy. However, the clear import of the structure and history of the FTCA is that remedies against individual officers were not intended to be ousted except under certain carefully delimited circumstances.

First, Congress *has* explicitly declared, in other types of cases, that the victims of federal employees' wrongful acts must be remitted to the FTCA. Thus, exclusivity has been extended to cases arising, *inter alia*, from the operation of motor vehicles by federal employees, 28 U.S.C. §2679; those involving the malpractice of certain government physicians, 38 U.S.C. §4116; 42 U.S.C. §§233, 2458(a); 22 U.S.C. §817; 10 U.S.C. §1089; and those against the manufacturers of swine flu vaccine, 42 U.S.C. §247(b). Given these explicit and limited declarations of exclusivity, common sense—and the commonplace maxim, *expressio unius est exclusio alterius*—suggest that Congress did not intend the FTCA to pre-empt other remedies in other types of cases.[13] Indeed, this has been the consistent holding of the lower courts. *Henderson v. Bluemink*, 511 F.2d 399, 403–04 (D.C. Cir. 1974); *Government Employees Insurance Co. v. Ziarno*, 273 F.2d 645 (2d Cir. 1960); *Fayerweather v. Bell*, 447 F.Supp. 913 (M.D. Pa. 1978); *Turner v. Ralston*, 409 F.Supp. 1260 (W.D. Wis. 1976). It is also the settled understanding among leading commentators on the FTCA. L. Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* §§178.01–178.03 (1964); W. Wright, *The Federal Tort Claims Act: Analyzed and Annotated* 77, 78, 79 (1957). The same view is supported by 28 U.S.C. §2676, which provides that judgment under the FTCA is a complete bar to suit against the individual employee involved—suggesting, conversely, that absent such a judgment, the individual may be sued.

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[13] Petitioner's claim that these narrow exclusivity positions somehow "reflect a *general* congressional intent to limit the personal liability of government employees action in the scope of their duties" (Pet. Br. at 35; emphasis supplied) is simply incomprehensible.

Moreover, in the single instance where Congress has directly considered the relationship of the FTCA to the *Bivens* remedy, Congress not only refrained from declaring the FTCA an exclusive remedy but indicated that it was quite comfortable with the coexistence of the *Bivens* remedy and the FTCA. In 1974, when Congress amended the FTCA to extend its coverage to include certain intentional torts committed by federal investigative or law enforcement officers,[14] it clearly acknowledged the viability of the *Bivens* remedy as an alternative to the FTCA.

> . . . [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action *against the individual Federal agents and* the Federal Government. Furthermore, *this provision should be viewed as a counterpart to the Bivens case* and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).
>
> S. Rep. No. 588, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Adm. News 2789, 2791 (emphasis supplied).

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[14] 28 U.S.C. §2680(h) provides a remedy against the United States for claims "arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by those officers.

While the present case does not arise under the 1974 amendments,[15] this legislative history[16] definitively refutes the notion that Congress regards the FTCA and the *Bivens* remedy as incompatible or redundant. Moreover, Congress' tolerance of the parallel *Bivens* remedy under the 1974 amendments, and of parallel state remedies in those areas of tort law not covered by one of the above-cited exclusivity provisions, undermines any argument that litigants must not be allowed to "avoid the statute of limitations, the administrative procedures, and other provisions carefully imposed by Congress in this area." Pet. Br. at 30-31 (footnotes and citations omitted). It is obvious from the statutory scheme and its tolerance of parallel remedies that these provisions are of concern to Congress only when recovery is to be had against the United States.

These indications of legislative intent are not, of course, binding on the Court's ultimate decision to recognize or deny the *Bivens* remedy. *Davis v. Passman*, ___ U.S. at ___, 99 S.Ct. at 2275. However, in view of the clear legislative intent *not* to make the FTCA an exclusive remedy in most cases, it is absurd to argue that deference to the legislative scheme of the FTCA is sufficient reason—or any reason—for restricting the *Bivens* remedy.

C. The FTCA is not a comprehensive remedial scheme for violations of constitutional rights.

In view of the *Bivens* standard and the clear intent of the FTCA to leave other remedies undistrubed, the Court need not reach the

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[15] Allegations of defective prison medical care were recognized as actionable under the FTCA long before 1974. *United States v. Muniz*, 374 U.S. 150 (1963).

[16] The quoted Senate report has been treated as the authoritative source for the legislative intent behind the 1974 amendments. *Norton v. United States*, 581 F.2d 390, 396 (4th Cir. 1978), *cert. denied* ___ U.S. ___, 99 S.Ct. 613 (1978).

Government's claim that the FTCA is a "comprehensive remedial scheme for the kind of claim raised here," Pet. Br. at 27, and that therefore the Court should restrict the availability of the *Bivens* remedy. However, the argument not only is irrelevant but proceeds from a false premise; the FTCA is not such a scheme. See Statement of Assistant Attorney General Babcock, *1978 Joint Senate Hearing, supra* at 370 (FTCA as applied to constitutional claims a "much troubled area of our legal system.")

The FTCA is by its terms designed to compensate the victims of most common law torts by government officers. The fact that some constitutional violations also give rise to common law tort claims hardly transforms the FTCA into a "comprehensive remedial scheme" for the vindication of constitutional rights. In fact, the FTCA displays significant shortcomings when drafted into the role of constitutional protector.

First, as discussed above, the FTCA lacks any provisions for individual accountability of any sort. Not only can individuals not only be sued under the FTCA; there is no provision for administrative sanction against the offending officer if the United States is found liable. Second, even if one makes the questionable assumption that a money judgment against the United States can effectively deter misconduct by its agents, the provisions of the FTCA are clearly inadequate for that purpose. The statute expressly bars punitive damages. 28 U.S.C. §2674. Moreover, many serious violations of the Constitution may be no more than nominally compensable under ordinary tort principles or under state law. *Carey v. Piphus*, 435 U.S. at 266. Third, the FTCA expressly forbids trial by jury, 28 U.S.C. §2402—a significant shortcoming where the claim is one of governmental abuse of citizens' constitutional rights.[17] Fourth, the

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[17] The Government may well be correct that frequently the absence of jury trial will be advantageous to the plaintiff, Pet. Br. at 38. However, it is hardly the Government's role to make that judgment; absent a clear Congressional direction to the contrary, the present option to choose between jury and nonjury procedures should be maintained.

FTCA, by its provision that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. §2674, permits the government to take advantage of an individual tortfeasor's defense of "good faith" or qualified immunity. *Norton v. United States*, 581 F.2d 390. Thus, the FTCA's compensatory design is compromised in constitutional cases by a defense designed for the protection of individual officers in the good faith execution of their tasks. See *Butz v. Economou*, 438 U.S. at 506–07. Fifth, the FTCA contains an exception for acts performed by federal employees "exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," 28 U.S.C. §2680(a)—a provision that would leave the claimant without any remedy where the act, however blatantly unconstitutional, was "protected" by statute or regulation. Sixth, the FTCA, in the same section, provides immunity for the United States in cases "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion be abused." This section has been interpreted as exempting from liability all decisions made "at a planning rather than an operational level." *Dalehite v. United States*, 346 U.S. 15, 42 (1953). In constitutional cases, this immunity has already been rejected as to individuals by the court in *Butz*. Obviously, many serious constitutional violations can result from the abuse of official discretion. It hardly makes sense to relegate the constitutional claimant to a remedy that is more limited than the *Bivens* action under the guise of serving a "comprehensive remedial scheme."[18] Seventh, the FTCA, in relegating the plaintiff

[18] Although the government does not make its position clear on this point, a litigant whose complaint revealed a claim actionable under state tort law would presumably be forced to seek relief through the FTCA, and if the claim was ultimately determined to be barred by one of the FTCA's exceptions, the plaintiff would have no remedy. The alternative position—that if subsequent proceedings resulted in dismissal not on the merits, the claimant would then be permitted to bring a *Bivens* action—would be no more satisfactory. If the statute of limitations had run on the *Bivens* claim by the time

to "the law of the place where the act or omission occurred," 28 U.S.C. §1346(b), precludes the development of a coherent body of federal law to guide the actions of federal officials and to govern actions to enforce federal rights against the federal government.

The importance of this last point cannot be overemphasized. ". . . [L]eav[ing] the problem of federal official liability to the vagaries of common-law actions," *Bivens*, 403 U.S. at 409 (Harlan, J., concurring), is not merely inconvenient. As *Bivens* itself noted, the interests protected by state tort law and by constitutional provisions "may be inconsistent or even hostile." *Id.* at 394 (majority opinion), 409 (Harlan, J., concurring). Certainly, as Justice Harlan warned, "there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers depending on the State where the injury occurs." *Id.* at 409. Such a result, especially where *state* official liability is governed by a uniform body of federal law developed under §1983 from general tort principles, would surely "stand the constitutional design on its head." *Butz*, 438 U.S. at 504.[19]

The anomalies that would result from adoption of the government's position are, indeed, illustrated in *Bivens* itself. The 1974 amendments to the FTCA, 28 U.S.C. §2680(h), would now permit someone

of the FTCA dismissal, the *Bivens* claim would also be lost. This uncertainty at the outset of litigation would create a strong incentive to bring both a *Bivens* and an FTCA suit in every case, so that a mistake of fact or law would not leave the victim without a remedy. The same result would obtain in a case where the law was unclear as to the existence of a state tort remedy or where factual development of the case showed that it did not meet the precise requirements of the state tort cause of action. Thus, the government's position would, on this alternative construction, create serious problems of manageability not even alluded to in its brief.

[19] Civil rights actions under §1983 are governed by state law only "so far as such laws are suitable to carry the same [the vindication of civil rights] into effect." 42 U.S.C. §1988.

in Webster Bivens' situation to sue the United States under local law. However, as Justice Brennan pointed out, 403 U.S. at 625, state tort law may excuse liability where government agents obtain entry by consent—a consent that is likely to be forthcoming simply because the agents invoke their governmental status. Application of state law under the FTCA would thus lead to the very result that the *Bivens* holding was designed in part to avoid. Moreover, federal officers' liability would depend on the availability of the consent defense from state to state. Similar anomalies are illustrated by *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978), in which FTCA liability was found for the opening of international mail by the Central Intelligence Agency. This determination of liability for a national agency's misconduct on a matter involving international relations was reached by an extensive—and sometimes speculative—canvass of the New York state law of privacy. (The law of common law copyright was also examined, but no liability was found on this basis.) Such a result is, of course, wholly incongruous and inappropriate. Moreover, had the case arisen in Wisconsin instead of in New York, the same acts could not have formed any basis for FTCA liability, since Wisconsin does not recognize a tort cause of action based on the right of privacy. *Hirsch v. S.C.Johnson & Sons*, ___ Wis. ___, 289 N.W.2d 129 (Wis.Sup.Ct. 1979). Thus, under the government's position, federal officials in some states would be personally liable for compensatory and punitive damages. In other states the purported exclusivity of the FTCA remedy would render federal officials personally immune.

In short, the government's characterization of the *Bivens* action as a "redundant remedy," Pet. Br. at 35, ignores substantial differences between *Bivens* and the FTCA and the significant inadequacies of the FTCA as applied to constitutional violations.

D. Congress has rejected executive proposals to grant personal immunity to federal officers in constitutional cases without significant changes in the FTCA. The Court should not permit the government to obtain from it what Congress has been unwilling to grant.

In applying the FTCA this Court has warned against "judicially admit[ting] at the back door that which has been legislatively turned away at the front door." *Laird v. Nelms*, 406 U.S. 797, 802 (1972). This is precisely the end sought by the government in this case. The executive branch has been seeking for six years to persuade Congress to grant federal employees immunity for constitutional torts;[20] its lack of success has been caused in large measure by Congress' concern over the policy questions cited in this brief. Indeed, these precise questions, as articulated in Congress, have compelled the Justice Department to revise its legislative proposals significantly, so that legislation now pending reflects a careful balancing of deterrence and other policies, a balancing completely absent from the government's position in this case. For the Court to adopt the government's position would be to pre-empt and bypass the concern of Congress with issues of deterrence and uniformity in the enforcement of constitutional rights.

In 1973, the Justice Department supported legislation that would have made the FTCA the exclusive remedy in all cases of federal constitutional violation. The Senate, however, rejected the government's bill, S.2558, 93d Cong., 1st Sess. (1973), and substituted for

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[20] In the legislative proceedings it has been assumed by the legislators and conceded by the Justice Department—directly contrary to the government's position in this Court—that the FTCA in its present form provides no basis for restriction of the *Bivens* remedy or immunization of federal officers. See, e.g., comments of Sen. Hruska, 119 Cong. Rec. 33495-97 (1973); comments of Sen. Metzenbaum, *1978 Joint Senate Hearings, supra* at 2; testimony of Attorney General Bell, *id.* at 5-6; Justice Department Responses to 12/14/77 Questions on S.2117, *id.* at 94-95.

it S.588, 93d Cong., 1st Sess. (1973), ultimately passed as 28 U.S.C. §2680(h). This amendment to the FTCA extended its coverage to include certain intentional torts, see 28 U.S.C. §2680(h), but was explicitly intended not to pre-empt or displace the *Bivens* remedy. Its legislative history clearly indicates that aggrieved individuals were to have a remedy "against the individual federal agents and the Federal Government. . . . [T]his provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic]. . . ." S.Rep. No. 588, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Adm. News 2789, 2791.[21]

In the House of Representatives, H.R. 10439, 93d Cong., 2d Sess. (1974), (counterpart to S.2558) died in committee. While it is impossible conclusively to state the reason for Congress' failure to pass legislation, it is clear that there was substantial concern for the lack of individual accountability that would result from abolishing the *Bivens* action and making the FTCA an exclusive remedy.

> Mr. MOORHEAD. You know, in these times when the public is so cognizant of the extreme acts of gross negligence where persons are shot where no weapons should be used at all, I think this could cut down on the care and diligence given by the police officers.
>
> * * *

[21] Senator Percy, one of the sponsors of the legislation, had previously expressed his view that the government should be required to compensate the victims of constitutional violations but that nevertheless "we must not lose sight of the important deterrent value served by the threat of civil suits being brought against offending agents. Federal narcotics officers must realize that they will be held responsible for their intentional violations of constitutional rights. . . ." S.Rep. No. 469, 93d Cong., 1st Sess. 36 (1973) (additional views of Senator Percy).

> . . . I really hate to see a situation where there is no possible action financially that can be taken against willful or gross negligence in situations like this without resort to a criminal trial.
>
> *Federal Torts Claim Amendments: Hearings on H.R. 10439 Before Subcommittee on Claims and the Governmental Relations of the House Committee on the Judiciary*, 93d Cong., 2d Sess., 16, 17 (1974).

See also testimony by J. Clay Smith, Chairman of the Tort Law Association. *Id.* at 34 (opposition expressed by some members to elimination of individual responsibility of federal employees).

On September 21, 1977, Senator Eastland introduced S.2117, 95th Cong., 1st Sess. (1977) drafted in the Justice Department and substantially similar to the 1973 proposal. Subsequently, a series of amendments was proposed by the Justice Department in response to committee criticism and debate. Ultimately these amendments were incorporated into a new bill, S. 3314/H.R. 9219, 95th Cong., 2d Sess. (1978), reintroduced in 1979 and still pending as H.R. 2659, 96th Cong., 1st Sess. (1979).

Criticism of the original bill and its amendments in both the House and the Senate centered around the proposal to immunize federal officers from personal liability. Rep. Jordan stated, "My first reservation about it is whether if, upon enactment of such legislation, the Federal employee somehow begins to feel cavalier about the conduct of his duties and the management of this own personal conduct, if you say the United States is exclusively liable. . . ." *Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary.* 95th Cong. 2d Sess. 10 (1978). Similarly, Rep. Mazzoli stated, "I think a

problem all of us have, is what has been earlier said as to what extent would the adoption of this kind of piece of legislation encourage people to be something less than prudent or circumspect or careful in their behavior. . . ." *Id.* at 18. Rep. Harris stated: "We have a basic problem that we have to work with and that is: Does this fact take off some of the disciplinary, some of the motivation of a police officer not to commit acts contrary to an individual's constitutional rights?" *Id.* at 28. Skepticism was expressed with regard to the efficacy as a deterrent of existing internal disciplinary procedures. See comments of Rep. Danielson, *id.* at 150–51; comments of Rep. Harris, *id.* at 140.

Similarly, in the Senate there was serious concern about the lack of accountability in a scheme for exclusive government liability for constitutional torts. As Senator Abourezk stated, S.2117 in its original form "[could] fairly be characterized as a private relief bill for every Federal official who violates the constitutional rights of American citizens . . . . [I]t is not hard to see that granting such broad and unequivocal immunity could encourage further lawlessness by federal officials." 124 Cong. Rec. S19483 (daily ed. Oct. 14, 1978); see also Prepared Statement of Assistant Attorney General Babcock, *1978 Joint Senate Hearing, supra,* at 370; Statement of Sen. Abourezk, *id.* at 3–4. Even after the bill was amended–absent which the bill clearly would not have passed, Abourezk, *id.* at 858–substantial concern remained about deterrence and accountability. See comments of Sen. Abourezk, *id.* at 860, 876; comments of Sen. Metzenbaum, *id.* at 375; comments of Sen. Percy, *id.* at 357-58; comments of Sen. DeConcini, *id.* at 355 (flaw in bill is that "it substitutes a strong remedial measure–the deep pocket of the United States–for a strong prophylactic measure–personal liability of the official").

These criticisms resulted in the submission of an amendment to permit the victim of unconstitutional conduct to initiate disciplinary proceedings against the offending federal employee. Letter from

Justice Dept. to Sen. Metzenbaum, April 10, 1978, *1978 Joint Senate Hearing, supra* at 52; see also exchange among Sen. Metzenbaum, Attorney General Bell, and Deputy Assistant Attorney General Jaffe, *id.* at 11–18. Attorney General Bell conceded that the prior absence of such a provision was "an obvious defect," *id.* at 15, and that the subcommittee would not report the bill out without it, *id.* at 17.

Other Congressional concerns about the defects of the FTCA as a constitutional remedy were also responded to by amendment.[22] For example, the Justice Department "decided to yield" and agreed to delete language permitting the government to assert the defense of "good faith" or qualified immunity. *Id.* at 93 (responses to questions), 48 (amendment). An amendment was submitted excepting constitutional torts from the "discretionary" and "statute or regulation" exceptions of 28 U.S.C. §2680(a). *Id.* at 48-49. Class actions would be permitted under the amended bill. *Id.*

Thus, the executive branch has made substantial concessions in recognition of concerns about personal accountability and other defects in its original proposal to make the FTCA an exclusive remedy in constitutional cases. The result is a pending proposal that, in former Attorney General Bell's words, "attempts to strike a difficult and careful balance between redressing Government wrongs suffered on occasion by individual Americans and the undisputed need to permit our Federal employees to conduct the affairs of Government in an uncowardly manner." *Id.* at 8.

For the government to seek, at this point, judicial endorsement of its original, rejected position, which would disregard and bypass all the Congressional objections to that position and discard the

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[22]Even in its original form, S.2117 provided for liquidated damages of $1000 where greater compensatory damages could not be proved. *Id.* at 33. The problem of incorporation of the "law of the place" would also be solved by S.2117 as introduced. *Id.* at 32.

"difficult and careful balance" in favor of a radical and one-sided limitation on individual remedies against governmental abuse of power, is simply disingenuous and should not be permitted.

CONCLUSION

For the reasons stated above, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

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Dated: November 15, 1979

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* The attorneys on this brief acknowledge the efforts of Max Beck, a law student assistant at the American Civil Liberties Foundation, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1261

NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, *et al.*,
Petitioners,

v.

MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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INDEX

INDEX—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, several past Presidents of the American Bar Association, a number of law school deans, and many of the nation's lead-

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* Letters from counsel for the parties to this action consenting to the filing of this brief have been tendered to the Clerk pursuant to Sup. Ct. Rule 42(2).

ing lawyers. Through its national office in Washington, D.C. and its offices in Jackson, Mississippi and eight other cities, the Lawyers' Committee over the past sixteen years has enlisted the services of over a thousand members of the private Bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

For many years, the Committee has been actively involved in litigation on behalf of racial minority persons seeking redress for violations of their constitutional rights. Although most of this litigation was brought against state officials pursuant to 42 U.S.C. § 1983, the Committee has also provided assistance to individuals pursuing claims of racial discrimination by officers of the federal government. As a result of its experience in such lawsuits, *amicus* is particularly concerned about the availability of an effective federal remedy for misconduct by law enforcement and correctional officials which results in the death of the victim.[1] This interest motivated the Committee's *amicus* participation on several occasions over the past several Terms, as this Court grappled with the relationship between state procedural law and federal damages actions for violations of constitutional rights.

[1] While blacks and other minorities are by no means the exclusive victims of such brutality, the truth of the matter is that there is frequently a connection between race and official lawlessness. The plaintiff's complaint in this case, for example, states that during the period from January 6 to August 14, 1975, four prisoners at the Federal Prison at Terre Haute, Indiana—all of them black—died after receiving medical "care" so abysmal as to evidence intentional maltreatment. The Complaint alleges that the fact that all of those who died were black is not coincidental, that non-white prisoners were the last to receive what meager medical attention was available and were the last to be admitted to the prison hospital. The Complaint alleges that the course of events preceding Joseph Jones' death "was caused in part by the fact that the deceased was black, and he was denied basic humane medical treatment, which resulted in his death, on the basis of race, . . ." (R. 4, 10).

In *Jones* v. *Hildebrant*, 432 U.S. 183 (1977) and *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), we suggested in *amicus* briefs that borrowing state survival and wrongful death statutes in actions brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, would cause many victims of official misconduct to be deprived of any effective remedy and would undermine the deterrent purposes of the legislation. Because of provisions which limit the amount of damages recoverable, or which permit recovery only by designated survivors, such statutes in many instances will cause a § 1983 action to abate if they are controlling on the procedural aspects of the suit. That result is not consonant with the purposes underlying constitutional tort litigation.

In this suit to redress an alleged violation of the Fifth Amendment, the petitioners seek to escape from being held fully liable for their unconstitutional actions by requiring that the court hearing the suit adopt the damages limitations of the forum state's "wrongful death" statute.[2] Petitioners claim that statute is applicable even though the Complaint, and the record, clearly establish that respondent brought this action on behalf of her son's estate, and not to recover for an injury to her own property interests. *Compare Jones* v. *Hildebrant, supra,* 432 U.S. at 187-88. Further, they claim that the law of the forum state is not "generally inhospitable" to con-

[2] The immediate result of applying Indiana's damages limitation in the manner suggested by petitioners would be to cause dismissal of this federal lawsuit for failure to meet the jurisdictional amount requirement of 28 U.S.C. § 1331. But even if respondent's timely federal action were held to toll the applicable statute of limitations so that she could refile her Fifth Amendment claim in an Indiana court, *see Jones* v. *Hildebrant, supra,* the state's limitation on recovery of damages will be given application with full force to prevent an award of punitive damages—sought in the Complaint—even though the right to recover punitive damages for violations of constitutional rights has been recognized by this Court. *Carey* v. *Piphus,* 435 U.S. 247, 257 n.11 (1978) (*dictum*).

stitutional tort actions even though its "survival" statute would plainly require abatement in all cases in which death is alleged to have resulted from the constitutional violation complained of. *Compare Robertson* v. *Wegmann*, *supra*, 436 U.S. at 594.

Because we believe that petitioners have incorrectly considered Indiana's "wrongful death" and "survival" statutes to be interchangeable, and because the result sought by petitioners can be achieved only by diluting the choice-of-law principles announced by this Court in *Robertson* v. *Wegmann*, *supra*, the Lawyers' Committee files this *amicus* brief.

STATEMENT OF THE CASE

This is a suit for damages based upon the federal Constitution, seeking redress for the death of Joseph Jones, who died while a prisoner at the federal penitentiary at Terre Haute, Indiana. The plaintiff (respondent here) is Marie Green, the decedent's mother. She brought this suit as administratrix of her son's estate. The most basic factual allegations of the Complaint about Jones' death are adequately set forth in petitioners' Brief.

The district court held that the Complaint stated a constitutional claim under *Estelle* v. *Gamble*, 429 U.S. 97 (1976), and that if Jones were alive he could maintain an action under 28 U.S.C. § 1331. But because, at common law, death extinguished any cause of action personal to a decedent, the court held that respondent's suit could be maintained only if it were permitted under Indiana law. The district judge ruled that "it is apparent that the plaintiff seeks the benefit of the [Indiana] wrongful death statute to provide her with standing [*sic*] to bring this action on behalf of her son's estate," and that under that statute respondent's recovery could not

possibly amount to $10,000.[3] Therefore, the court ruled that it lacked subject matter jurisdiction.[4] The action was dismissed.

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[3] Where a decedent leaves no spouse or *dependent* next of kin, Indiana's wrongful death statute limits recovery to reasonable medical and funeral expenses and the costs of estate administration. *See* note 40 *infra*.

[4] In dismissing the plaintiff's action on January 10, 1977, the district court said (Pet. App. 25a-27a):

> With respect to the jurisdictional amount issue herein, the Court is aware that "liberal standards" are to be used in ascertaining the existence of the necessary amount in controversy in cases brought under § 1331 alleging a constitutional denial. *Calvin* v. *Conlisk*, 520 F.2d 1, 9 (7th Cir. 1975), vac. on other grounds, 424 U.S. 902 (1976). In light of such standard, the Court believes that given the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under § 1331 alleging a denial of proper medical treatment. *Estelle* v. *Gamble*, *supra*. However, since Jones has died neither leaving any dependents nor having incurred medical or burial expenses sufficient to satisfy the $10,000 requirement, it is not possible for the plaintiff herein to maintain this action under the Indiana wrongful death or survival statutes. *Ind. Ann. Stats.* §§ 34-1-1-1 - 34-1-1-2 (Burns Code Ed.). Although the plaintiff insists in her brief that this is not an action "for pecuniary loss of support" based on any state statutes like the above, the Court believes that such statutes are the sole mechanism by which the personal representative of a decedent's estate may maintain an action for damages arising from the decedent's death. The plaintiff obviously is attempting to avoid the limitations on recovery inherent in the statutory remedy and characterizes this as an action "of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages." The court does not believe that such an action exists other than as set out in the wrongful death and survival statutes.
>
> It is recognized that one person may not generally seek redress for constitutional deprivations suffered by another. *United States* v. *Raines*, 362 U.S. 17 (1960). At common law, the plaintiff herein could not have maintained an action such as this on behalf of the decedent's estate since such actions did not generally survive the injured person's death. It is apparent the plaintiff seeks the benefit of the wrongful death statute to provide her with standing to bring this action on behalf of Jones' estate, but yet she asserts such statute is

On appeal, the Seventh Circuit agreed with the conclusion that a direct constitutional action for damages was proper. Turning to the question of the survival of that cause of action, the Court of Appeals determined to apply the principles and analysis of *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), even though respondent's suit was not based on 42 U.S.C. § 1983. Accordingly, the Court of Appeals examined the law of the forum state concerning survival of actions.

Indiana has both a "survival" statute (Ind. Code Ann. § 34-1-1-1) and a "wrongful death" act (Ind. Code Ann. § 34-1-1-2).[5] The district court had not discussed the state's "survival" statute, but the Court of Appeals recognized that it was inapplicable to this case because it furnishes a survival mechanism only when death results from injuries *other than* those which are the basis of the cause of action.

The Court of Appeals then rejected the district judge's assumption that the vehicle for respondent's suit was Indiana's "wrongful death" act. As administratrix, the panel held, respondent was asserting her son's cause of action, and not (as authorized by wrongful death statutes) a cause of action for losses, occasioned by his death, to her as a survivor.

Under these circumstances, the Court of Appeals stated, the creation of federal common law permitting survival of the action was necessary to effectuate the policy of

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not applicable to her action. The plaintiff should not be able to accept the benefits conferred by such statutes without assuming the limitations imposed therein as well.

[5] Indiana law also creates a distinct wrongful death action for the death of a child, Ind. Code Ann. § 34-1-1-8, but if a child has been emancipated, and is not in the service of the parent, any action must be brought under § 34-1-1-2. *See Childs* v. *Rayburn*, 52 Ind. Dec. 404, 346 N.E.2d 655, 660 (Ct. App. 1976). It is clear that § 34-1-1-8 has no application to this case.

vindicating constitutional rights which is the basis for the federal cause of action. 581 F. 2d at 674.[6]

SUMMARY OF ARGUMENT

I. The writ of certiorari should be dismissed as improvidently granted.

A. The question whether an adequate Federal Tort Claims Act remedy exists which makes it unnecessary to permit respondent to assert a cause of action directly under the Fifth and Eighth Amendments to the Constitution was never raised below. No basis for departing from this Court's usual practice of limiting review to issues which have been passed upon by the lower courts has been demonstrated by petitioners.

B. The survivorship question, as framed by the petitioners, is simply not in this case. Petitioners have assumed that Indiana's "wrongful death" statute is applicable, but that statute creates a cause of action quite distinct from the constitutional claims asserted by respondent as the legal representative of her son's estate. For precisely this reason, the court below ruled explicitly that the "wrongful death" statute was irrelevant to this

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[6] In additional support of its conclusion, the Court of Appeals noted the desirability of uniformity in actions against federal officials. It pointed out that the same action would have survived under Illinois law, which the court had recently "borrowed" pursuant to § 1988 in *Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977). The Court expressed its belief that the liability of federal agents for violating constitutional rights should not depend upon where the violation occurs, and it suggested that because federal prison authorities decide the prison facility in which an individual will be incarcerated, in a sense they choose the place where the wrong occurs. 581 F.2d at 675.

It is significant that, because neither of Indiana's statutes were applicable to respondent's cause of action, the Court of Appeals properly gave no consideration to the issue which is the main focus of petitioners' Brief—whether limitations on damages contained in state survival statutes would defeat the federal policies of compensation and deterrence underlying a *Bivens*-type action.

suit, and petitioners have not sought review of that holding. On the other hand, petitioners appear to concede *sub silentio* that creation of federal common law is warranted to keep this action from abating under Indiana's "survival" statute.

II. The Court of Appeals was right in applying federal common law to allow this action to go forward and to vindicate Joseph Jones' constitutional rights.

A. In suits to redress the violation of federal rights, at least where the deprivation of these rights is alleged to have caused death, the ability of the victim's estate or next-of-kin to recover damages for invasion of the decedent's rights cannot turn upon state survival law. Only by creating a uniform federal law of survival applicable to such cases can this Court carry out the twin goals of compensating the victim and deterring illegal conduct which lie at the root of the federal cause of action.

B. If survival of Joseph Jones' cause of action to recover damages for the violation of his constitutional rights is to depend upon an examination of Indiana law rather than a uniform federal rule, nevertheless the judgment below was proper. The only Indiana law relevant to respondent's cause of action imposes an absolute bar to vindication of Jones' constitutional rights and, according to principles developed in decisions of this Court under 42 U.S.C. § 1988 and the Rules of Decision Act, federal common law which avoids that result must be developed and applied to this case. If the foregoing conclusions are incorrect and this Court reaches the issue of the validity of the damages limitations in Indiana's "wrongful death" statute in a federal cause of action to redress death-producing constitutional violations, it should find those limitations inapplicable to this lawsuit. Otherwise federal officials will be subject to no credible deterrent against unconstitutional conduct so long as it results in death, rather than merely in injury.

ARGUMENT

I

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. The first Question Presented was neither raised below nor considered by the Court of Appeals and is not properly before this Court.

The government discloses in footnote 9 of the Brief for Petitioners that in the Court of Appeals, it did not argue that the Federal Tort Claims Act provides an adequate remedy for deprivations by federal officers of rights guaranteed by the Eighth Amendment, making implication of a constitutional cause of action unnecessary. While it is true that, in certain exceptional circumstances, this Court will decide issues not raised below, *see, e.g.*, *Duignan* v. *United States*, 274 U.S. 195, 200 (1927), petitioners offer no such justification for doing so in this case.

In *Youakim* v. *Miller*, 425 U.S. 231 (1976),[7] cited by petitioners, a unique combination of circumstances[8] jus-

[7] The plaintiffs in *Youakim* had unsuccessfully attacked Illinois' foster care payment program on Equal Protection Clause grounds, then sought in the Jurisdictional Statement to add a claim that the Illinois system was in conflict with the Social Security Act. This Supremacy Clause claim had not been presented to the District Court as a separate ground for challenging the state law. 425 U.S. at 233. This Court addressed the Supremacy Clause issue, but only to the limited extent of vacating the judgment below and remanding the case for consideration of the claim.

[8] The circumstances were: (a) attacks on state welfare statutes frequently combine Equal Protection and Supremacy Clause issues; (b) the statutory issue was not foreign to the subject matter of the complaint; (c) the complaint had alleged as a "factual" matter that the Illinois scheme conflicted with federal policy as set forth in the Social Security Act; (d) statements in the district judge's opinion strongly suggested that if the conflict issue had been ad-

tified an exception to the usual rule limiting review to matters preserved in the lower courts. The Order in that case vacating the judgment and remanding to the district court for further proceedings served the substantial interest of avoiding a decision of constitutional magnitude where the case might be disposed of on other grounds. 425 U.S. at 236. Similar circumstances or policy interests are absent from this case.[9] The Federal Tort Claims Act argument made its first appearance in this case in the Petition for Writ of Certiorari and is unrelated to any argument made below. *Cf. Procunier* v. *Navarette*, 434 U.S. 555 (1978).

Petitioners advance three grounds not present in *Youakim* as a basis upon which the Court should exercise its discretion to hear the Tort Claims Act issue in this case. First, they argue that the issue mistakenly believed raised in this case was in fact properly preserved in *Moffitt* v. *Loe* (No. 78-1260). The government's petition for certiorari in that matter seeks review of a Fourth Circuit ruling which it says encompasses the Tort Claims Act question but requests that the Court defer action pending disposition of the case *sub judice*. Assuming *arguendo* that it would be appropriate to consider an issue never raised below in one case because it was preserved in another,[10] an examination of the Court of Appeals' opinion and the petition for certiorari in *Moffitt* v. *Loe* shows that the Tort Claims Act issue is not fairly presented in that case either.[11]

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vanced as a separate ground for decision, it would have been rejected; (e) between the time the Jurisdictional Statement was filed and the date probable jurisdiction was noted, the Department of HEW had issued special instructions which had a direct bearing on the issue; and (f) the Solicitor General had filed a brief in this Court stating the view of the government that the Illinois foster care program was inconsistent with the Social Security Act.

[9] Indeed, the situation before the Court is more closely analogous to that in *Tacon* v. *Arizona*, 410 U.S. 351 (1973). The petitioner in that case had been tried, convicted and sentenced *in absentia* in state court. On his direct appeal in the state court, he argued that under the circumstances (he was unable to appear on the trial date due to lack of travel funds), the evidence was insufficient to show a voluntary and intelligent waiver of his right to be present at his trial. This Court refused to consider a different question presented in his petition for certiorari: whether a state can, consistent with the Constitution, try a person *in absentia* who has left the state and cannot return for lack of funds. The Court held that these broad issues were not passed upon by the state Supreme Court, and that the only related issue (the question of waiver) was primarily factual and did not justify the exercise of the *certiorari* jurisdiction.

[10] Petitioners cite no authority for this novel proposition, and our research has disclosed none.

[11] Loe filed suit against federal officers, state officers, and state employees claiming that they had deliberately denied him adequate medical treatment for a broken arm sustained by him while being held in a local jail in pretrial federal custody. His complaint was dismissed for failure to state a claim upon which relief could be granted. After that dismissal, Loe filed two subsequent complaints essentially repeating the allegations of the original pleading. These were also dismissed, on grounds of *res judicata*. All three rulings were appealed by Loe, and during oral argument in the Fourth Circuit on the consolidated appeals, Loe's counsel conceded that the second and third complaints did not raise any new issues, and that a decision as to the initial complaint would be dispositive. *Petition for Certiorari* in No. 78-1260, at 3a n.1. Thus, the Court of Appeals addressed only the initial complaint. As described by that court:

> The questions before us are whether Loe alleged a cause of action against the state defendants, whether he has a cause of action against the federal defendants, and, if so, whether he sufficiently alleged it. *Id.*

In its petition for certiorari in *Loe*, the government does not seek review of any substantive holding by the Court of Appeals. Instead, it alleges that one of the subsequent complaints filed by Loe sought relief under the Federal Tort Claims Act, *id.* at 6-7, and that this complaint was "dismissed erroneously [by the district court] on the ground of res judicata," *id.* at 8 n.8. The Question Presented by the Petition, however, is whether a remedy for constitutional violations can be implied where the Federal Tort Claims Act provides an adequate federal remedy. *Id.* at 2.

This Question Presented in *Loe* is simply not raised by the record. Neither the majority of the Court of Appeals nor the dissent made any mention of the Tort Claims Act, much less decided the question

Second, the government suggests that the survivorship issue is "independently worthy of plenary review" and therefore, as a matter of sound judicial administration, the Court should decide the Tort Claims Act issue as well. Acceptance of this argument would constitute a precedent that, so long as one issue was "independently worthy of plenary review," other collateral questions would be entitled to consideration if included among the Questions Presented. Such a disposition would add a new dimension to the recognized rule that a *prevailing* party may make alternative arguments, although not passed upon by the lower courts, in support of his judgment. Acceptance of the petitioners' submission would mean that a *losing* party could advance novel legal theories for the first time in this Court by the simple expedient of including them in the "Questions Presented" and then arguing that "efficient judicial administration" requires that they be heard. It is difficult to see how the Court could entertain the petitioners' suggestion without undermining *Youakim* and the Court's many other relevant precedents. *E.g.*, *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Hicks* v. *Miranda*, 422 U.S. 332, 338 n.5 (1975). In any event, for the reasons discussed in Argument I.B. below, *amicus* believes that the survival issue is not "independently worthy of plenary review" because it is based upon a fundamental mischaracterization of Indiana's "wrongful death" act as a "survival" provision.

Finally, petitioners find it significant that the respondent addressed the merits of the claim in the Brief in Opposition to Certiorari. This, of course, is no reason at

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on its merits. The dismissal on *res judicata* grounds of Loe's compiaint which apparently sought relief under the Act is the law of the case. While Loe appealed that ruling to the Fourth Circuit, his separate Tort Claims Act contention was abandoned during the oral argument. The government cannot bootstrap the Federal Tort Claims Act issue in the instant case by arguing that it was properly raised in *Loe*.

all for the Court to vary its usual rule. There is no operative concept of waiver or estoppel which should influence this Court's determination whether an issue is in the proper posture and merits discretionary review.

In view of the fact that the Federal Tort Claims Act question was neither presented nor decided below, the Court should not reach the first Question Presented in the government's petition.

B. The other "Question Presented" incorporates a misinterpretation of Indiana law, correction of which is not "independently worthy of plenary review" through this Court's *certiorari* jurisdiction.

The second "Question Presented" in the petition is "[w]hether, if the Eighth Amendment creates such a right [to bring a direct constitutional cause of action], survival of that action is governed by federal common law rather than the state statutes that apply to analogous cases." The petitioners' entire argument on this point rests upon a misconstruction of Indiana law which fails to address the grounds upon which the Court of Appeals' decision rested.

We assume *arguendo* that it is appropriate to look to applicable state law for procedural details in a suit brought directly under the Constitution. But, contrary to petitioners' assertion, "[u]nder Indiana law, [*not*] all tort claims survive to some extent" (Pet. Br. at 47). Under the state's survival statute, Ind. Code Ann. § 34-1-1-1, there is a significant exception to the general rule that "[a]ll causes of action shall survive"—an exception covering every case in which an individual dies as a result of the injuries giving rise to the cause of action. (*See* Pet. Br. at 4.) Had Joseph Jones commenced this lawsuit prior to his death, under Indiana's survival statute it would clearly have abated when he died. This was

the holding of the court below, 581 F.2d at 673 n.8, and petitioners do not challenge this interpretation of Indana law.

Petitioners do not seek to defend the harsh results which would inexorably follow application of Indiana's survival statute to suits where the victim dies from injuries inflicted in violation of the Constitution. Instead, they characterize Indiana's survival statute *and* its wrongful death statute (§ 34-1-1-2), *taken together*, as "permit[ting] survival of all actions" (Pet. Br. at 48). But the state's wrongful death act is totally inapplicable here.

Indiana's wrongful death statute creates a "cause of action to provide a means by which those who have sustained a loss by reason of the death may be compensated." *Pickens* v. *Pickens*, 255 Ind. 119, 126, 263 N.E.2d 151, 155 (1970); *see* Note, *Wrongful Death Actions in Indiana*, 34 IND. L. J. 108, 109 (1958-59). As described in *Bocek* v. *Inter-Ins. Exch. of Chicago Motor Club*, 60 Ind. Dec. 30, 369 N.E.2d 1093, 1096 (Ct. App. 1977):

> This statutory creation of the right to sue in cases involving a wrongful death is intended to provide for the financial loss suffered by the widow, children or next of kin because of the death of the person involved. *New York Central R.R. Co.* v. *Clark, Extr.* (1964), 136 Ind. App. 57, 197 N.E.2d 646. It was specifically enacted to overcome the result occasioned by adherence to the old English case of *Baker* v. *Bolton* (1808), 1 Camp. 493, 170 Eng. Rep. 1033, in which the death of a human being was not considered a compensable injury. *See, Pickens* v. *Pickens* (1970), 255 Ind. 119, 263 N.E.2d 151. The statute therefore is not a remedy for the victim.

This is not the cause of action described in respondent's complaint.[12] The injury for which the plaintiff in this case seeks redress, as her son's personal representative, is the deprivation of Joseph Jones' constitutional rights, whereas the Indiana wrongful death act provides a means of redress for pecuniary losses suffered by survivors as a result of a decedent's death. Those are demonstrably different injuries. *Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 575 n.2 (1974).

In *Jones* v. *Hildebrant*, *supra*, this Court emphasized the importance of identifying the cause of action in determining the source of procedural law in a suit for damages based on a claimed violation of the Constitution. The writ of certiorari was dismissed in that case because it became clear at oral argument that the theory of the plaintiff's action (deprivation of a mother's constitutional right to raise her child) was different from the cause of action which had been advanced in the Colorado courts, or which would have been covered by Colorado's wrongful death act.[13] The Court observed:

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[12] As explained in respondent's Answer to Motion to Dismiss filed in the district court on November 30, 1976 (R. 36):

> Defendant Commission mistakes the plain meaning of Plaintiff's Complaint in suggesting that it is governed or at all affected by the Indiana Wrongful Death Act. Plaintiff does not "allege a wrongful death action occurring in the State of Indiana," as stated in the Commission's Memorandum. Rather, as administratrix of her deceased son's estate, Plaintiff claims recovery for the willful violation of his rights under the Fifth and Eighth Amendments to the United States Constitution. This is not a case of a dependent survivor making a claim for pecuniary loss of support, but of the Estate of one who was deprived of fundamental human rights suing for justice in the form of money damages. It is in no way tied to the Indiana law of wrongful death.

[13] "The majority opinion in the Supreme Court of Colorado proceeds on the assumption that if the Colorado wrongful-death statute applied to petitioner's claim, her recovery would be limited

> The question of whether a limitation on recovery of damages imposed by a state wrongful death statute may be applied where death is said to have resulted from a violation of 42 U.S.C. § 1983 would appear to make sense only where the § 1983 damages claim is based upon the same injuries.

Jones v. *Hildebrant, supra,* 432 U.S. at 187.[14]

In this case, the district court treated the plaintiff's constitutionally based claim as indistinguishable from the Indiana wrongful death action based upon its be-

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to $45,000. It held that this limitation did apply even to the one count of petitioner's complaint based on 42 U.S.C. § 1983.

A necessary assumption for this position would seem to be that petitioner was suing to recover damages for injuries under § 1983 which were the same injuries as are covered by the state wrongful-death action. The question presented in the petition for certiorari is at the very least susceptible of that interpretation. But at oral argument, we were advised by counsel for petitioner that her sole claim of constitutional deprivation was not one of pecuniary loss resulting from her *son's* wrongful death, such as would be covered by the wrongful-death statute, but one based on *her* personal liberty. Her claim was described at oral argument as a constitutional right to raise her child without interference from the State; it has nothing to do with an action for 'wrongful death' as defined by the state law. Tr. of Oral Arg. 4-5; see also *id.*, at 8-13.

An action for wrongful death, under Colorado law, is an action which may be brought by certain named survivors of a decedent who sustain a direct pecuniary loss upon the death of the decedent. It is 'classified as a property tort action and cannot be classified as a tort action "for injuries done to the person,"' *Fish* v. *Liley,* 120 Colo. 156, 163, 208 P.2d 930 (1949). Petitioner, however, articulates here a quite different constitutional claim which does not fit into the Colorado wrongful-death mold." *Jones* v. *Hildebrant, supra,* 432 U.S. at 185-86 [footnote omitted] (emphasis in original).

[14] Petitioners seem to recognize this principle when, in describing the questions reserved by this Court in *Robertson* v. *Wegmann, supra,* they say: "First, the Court noted that a different result might obtain if the *pertinent* state survival law was generally inhospitable to constitutional tort claims" (Pet. Br. at 47) (emphasis added).

lief that "such statutes are the sole mechanism by which the personal representative of a decedent's estate may maintain an action for damages arising from the decedent's death." (Pet. at 26a.)[15] But this approach was rejected by the Court of Appeals, which stated:

> It is important, however, to characterize plaintiff's complaint properly. The district court erred in its characterization. The plaintiff is suing neither for deprivation of another's constitutional rights nor on an independent statutorily created cause of action such as an action for wrongful death. Rather, she is asserting her son's cause of action as the administratrix of his estate.

581 F.2d at 672 n.4. The Court of Appeals went on to hold that *federal common law* could furnish the "mechanism by which the personal representative of a decedent's estate may maintain an action for damages" for injuries causing the decedent's death, a proposition with which even the petitioners are willing to agree (so long as the circumstances are, in their view, "extraordinary") (*see* Pet. Br. at 41). The petitioners did not, however, seek review in this Court of the Seventh Circuit's determination that the Indiana "wrongful death" act was inapplicable to this suit. Since that ruling completely removes the predicate for the petitioners' "survival" argument, the issue they seek to have this Court decide is simply not in the case.[16]

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[15] Petitioners do not defend the district court's resolution of this issue on its own terms but make a different argument: that what they characterize as "Indiana survival law" (the survival and wrongful death statutes, taken together) is generally hospitable to claims of constitutional violation. But their Brief totally fails to meet the critical ruling of the court below on the construction of Indiana law. *See* text *infra.*

[16] This is not, therefore, a case like *Robertson* v. *Wegmann,* where an applicable state survival statute existed and was available for adoption in the federal suit, although it would cause some individual actions to abate. The Indiana wrongful death act does not apply at all to the cause of action asserted by the plaintiff.

Because we believe that the first Question Presented is an issue not properly preserved below, and that the second is based upon a misunderstanding of Indiana law and how it relates to this case (implicating an unchallenged ruling of the Court of Appeals), we urge the Court to dismiss the writ of certiorari as improvidently granted. *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963). The important issues seemingly raised by the case, and contained in the petition for certiorari, are not presented on this record. *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228 (1972); *McClanahan* v. *Morauer & Hartzell*, 404 U.S. 16 (1971); *Bostic* v. *United States*, 402 U.S. 547 (1971); *Jones* v. *State Bd. of Educ.*, 397 U.S. 31 (1970); *Palmieri* v. *Florida*, 393 U.S. 218 (1968); *Williams* v. *Zuckert*, 371 U.S. 531 (1963); *Needelman* v. *United States*, 362 U.S. 660 (1960); *McCarthy* v. *Bruner*, 323 U.S. 673 (1944); *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1917).

II

FEDERAL COMMON LAW WAS PROPERLY APPLIED BY THE COURT BELOW IN THIS ACTION TO REDRESS THE DEPRIVATION OF JOSEPH JONES' CONSTITUTIONAL RIGHTS.

Introduction

We have set forth above the reasons why we believe the Court should not reach the merits in this case. Should the Court conclude otherwise, then the judgment below must be affirmed.

With respect to the *Bivens* issue,[17] we fully support the result reached by the Seventh Circuit. The government's Federal Tort Claims Act assertion is not substantiated by either the statute's legislative history or logical analysis; but we leave development of these points to the

[17] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

parties and other *amici*.[18] The survivorship inquiry is of considerable concern to the Lawyers' Committee (*see* statement of Interest, *supra*), and we address it at greater length in the balance of this Brief.

We urge more than mere affirmance of the judgment below. This Court should relieve federal trial judges from the burden of canvassing and analyzing state survival statutes as a preliminary matter whenever they entertain litigation to vindicate the constitutional rights of one whose death was caused by the violation of those rights. At least in such cases—if not in all suits to redress infringement of constitutional guarantees—the question of survival of the cause of action should be governed by uniform standards as a matter of federal common law. Nothing in 42 U.S.C. § 1988 or the Rules of Decision Act precludes this Court from determining and announcing that this procedural issue is inappropriate for resolution according to the congeries of state law provisions which touch upon it.

[18] The government's argument addresses the Eighth Amendment question. However, the Complaint in this case, fairly read, also includes a claim based upon racial discrimination violative of the Fifth Amendment. *See* note 1 *supra*. "[T]his Court has already settled that a cause of action may be implied directly under the Equal Protection Component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." *Davis* v. *Passman*, —— U.S. ——, ——, 60 L. Ed. 2d 846, 861 (1979) (footnote omitted), citing *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Whatever may be the reach of the Tort Claims Act to a failure to provide medical treatment, we have been able to find no reported case in which the Act has been interpreted to provide a remedy for racial discrimination. *Cf.* 28 U.S.C. § 2680(h).

A. At least where death is alleged to have resulted from unconstitutional actions, federal common law should govern the question of survival of the right of action to be brought by a decedent's estate or personal representative.

We contend in Argument II.B., below, that the judgment of the Court of Appeals in this case can be sustained because of the patent inadequacy of the survival law of the particular forum state involved. But we believe the district court's confusion about which Indiana law was applicable to the survivorship issue provides a good illustration of the errors which could be avoided, and the judicial time and energy which could be saved if this Court were to announce that survival questions in constitutional cases should be governed by federal common law. At the very least, the Court should adopt this approach in cases in which the constitutional violation is alleged to have caused death.[19]

We are in full agreement with the petitioners "that the issue of what law governs the survival of constitutional damage actions is a question of federal law." We also agree that "Congress often does not supply all of the procedural details of a federal remedial scheme," and that simply because the origins of the respondent's cause of action are federal, state law is not rendered necessarily irrelevant. Pet. Br. at 42.[20] What we cannot ac-

[19] In our *amicus* brief in *Jones* v. *Hildebrant, supra,* we suggested that the Court create a uniform federal common law of survival and wrongful death under § 1983 in order to avoid the difficulties inherent in borrowing state statutes, and in order to vindicate the purposes of the Civil Rights Act of 1871. *Brief for the Lawyers' Committee, et al. as Amici Curiae* at 44-49. That course seemed to us to be appropriate in a case which, until oral argument, appeared to resemble closely a "wrongful death" action. *See Jones* v. *Hildebrant, supra,* 432 U.S. at 185-86; *but see Brief for the Lawyers' Committee, et al. as Amici Curiae* at 20-31.

[20] Our only disagreement with the Court of Appeals in this case concerns the basis for the examination of state law. In *Robertson*

v. *Wegmann, supra,* the Court interpreted the provisions of 42 U.S.C. § 1988 in the context of a suit under § 1983 alleging a violation of constitutional rights. The Court held that, when federal law is deficient, § 1988 instructs a trial court to utilize "the common law, as modified and changed by the Constitution and statutes of the [forum] State," as long as those are "not inconsistent with the Constitution and laws of the United States." The Court of Appeals in this case acknowledged that, where a suit is predicated not on § 1983 but on the Constitution itself, § 1988 "has no statutory effect." 581 F.2d at 673. Nevertheless, the Court of Appeals decided to utilize § 1988 because, in its view, "actions brought under the civil rights acts and those of the *Bivens*-type cases are conceptually identical and further the same policies . . . ." *Id.* at 669. The fact of the matter, however, is that by its terms this statute has no application beyond prescribing a procedure to be followed in causes of action created by the Civil Rights Acts. In *Robertson* v. *Wegmann,* perhaps the key difference between the majority and dissenting opinions was, as stated by Mr. Justice Blackmun, "the Court's apparent conclusion that, absent . . . an extreme inconsistency, § 1988 restricts courts to state law on matters of procedure and remedy." 436 U.S. at 596 (dissenting opinion).

The fact that § 1988 does not apply to a *Bivens*-type cause of action does not mean that state law has no role to play. The appropriate principles are set forth in the Rules of Decision Act, 28 U.S.C. § 1652, which provides:

> . . . the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

This Court has never regarded the Rules of Decision Act as requiring the application of state laws to every matter not covered by a federal statute or rule. *See generally, Brief for the Lawyers' Committee for Civil Rights as Amicus Curiae, Robertson* v. *Wegmann, supra,* at 17-29. To the contrary, this Court has frequently determined that the creation of interstitial common law is necessary to carry out federal substantive law and policy. *E.g., Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971); *J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962); *Farmers Educ. & Coop. Union* v. *WDAY,* 360 U.S. 525 (1959); *McAllister* v. *Magnolia Petroleum Co.,* 357 U.S. 221 (1958); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *National Metropolitan Bank* v. *United States,* 323 U.S. 454 (1945); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210 (1944); *Clearfield Trust Co.* v. *United States,* 318 U.S. 363

cept is the government's bald statement, unsupported by any disclosed authority, that "federal law adopts the relevant state standard unless application of local law would *utterly* defeat the federal interests involved." *Id.* (emphasis added).

While this Court has ". . . occasionally selected state law" as the federal rule, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943), it has also made determinations (based upon underlying federal policy) that uniform federal common law must govern the determination of specific issues or cases. *E.g., id.; United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973). *See also* Note, *Federal Common Law*, 82 HARV. L. REV. 1512 (1969). Even with respect to issues traditionally governed by state law, in a federal cause of action, a court still "must inquire whether the need exists for

(1943); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Jackson County* v. *United States*, 308 U.S. 343 (1939); *see generally* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). A clear and concise exposition of the relevant principles appears in *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 590-93 (1973):

> . . . The suggestion is that this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), compels application of state law here because the Rules of Decisions Act, 28 U.S.C. § 1652, requires application of state law in the absence of an explicit congressional command to the contrary. We disagree.
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> . . . Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be "ordinary" or "local" as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved, as in this case. In such cases, the Constitution or Acts of Congress "require" otherwise than that state law govern of its own force.
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> . . . the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. . . .

federal law to further federal policies or foster uniformity. If either circumstance is present, it must weigh the benefits promised by local solution against the need for a national rule." *Id.* at 1531. Such an analysis convinces *amicus* that the issue of survival of the cause of action—at least where the violation of the federal Constitution or law is alleged to have resulted in death [21]—should not be controlled by state law. *Cf. Basista* v. *Weir*, 340 F.2d 74, 86-87 (3d Cir. 1965).

This Court emphasized the need for an independent, uniform federal law of remedy for constitutional violations in its decision in *Bivens, supra.* In that case, the Court rejected an argument that the petitioner's Fourth Amendment rights were essentially rights of privacy and therefore creations of state and not federal law.[22] In his

[21] We believe the same principle should be applicable to all questions of survival in actions to redress federal constitutional or legal violations, *see Robertson* v. *Wegmann, supra*, 436 U.S. at 599-601 (dissenting opinion), but the Court need not decide the broader issue in the instant case.

[22] According to this argument, Bivens' cause of action sounded in tort and would have to be brought in state court. The only significance of the Fourth Amendment would be "to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power . . . ." 403 U.S. at 390-91. The Court rejected this scenario because it could not accept the notion that, when a federal agent exercises his authority in an unconstitutional manner, he is no different from any private citizen. The Court explained:

> . . . the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S., at 684 (footnote omitted); see *Bemis Bros. Bag Co.* v.

opinion concurring in the judgment, Justice Harlan pointed out that

> . . . the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. See *Monroe* v. *Pape*, 365 U.S. 167, 195 (1961) HARLAN, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963); *Monroe* v. *Pape*, *supra*, at 194-195 (HARLAN, J., concurring); *Howard* v. *Lyons*, 360 U.S. 593 (1959). *Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs.* Cf. *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-311 (1947).

403 U.S. at 409 (emphasis added).[23]

Petitioners reject any need for uniformity, citing decisions which applied state statutes of limitations to federal causes of action. But unlike statutes of limitations, whose purpose is to provide assurance that one will not

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United States, 289 U.S. 28, 36 (1933) (Cardozo, J.); *The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.).

403 U.S. at 392. The Court further observed that "the interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." 403 U.S. at 394.

[23] The Court of Appeals concluded that "[t]he liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred." 581 F.2d at 675.

be held to answer for conduct long past, survival statutes serve no interest in repose; abatement of the litigation because of the death of the victim arbitrarily cuts off all opportunity to redress the injury.[24] Whatever may be the justification for allowing this result in litigation to enforce state-created tort interests, there is no adequate reason to permit the vindication of constitutional rights, and the deterrence of unconstitutional conduct, to be impeded because of the death of one who claimed denial of his rights. Such a result completely frustrates the purposes of the federal Civil Rights Acts.

Petitioners rely principally upon *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), holding that the timeliness of a suit brought to enforce a collective bargaining agreement under § 301 of the Labor-management Relations Act would be governed by a state statute of limitations. In that case, the Court acknowledged that the subject matter of § 301 is "peculiarly one that calls for uniform law" but found that the specific problem before it—the timeliness of bringing suit—was not of that genre:

> The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.

383 U.S. at 702. Petitioners assert that, like statutes of limitations, the law governing survival of constitutional

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[24] *See Ingram* v. *Steven Robert Corp.*, 547 F.2d 1260, 1262 n.2 (5th Cir. 1977).

damages actions does not become an issue until after the policy of deterring federal officials from unconstitutional behavior has failed in its purpose." Pet. Br. at 44. But there is no equivalent of the National Labor Relations Board which exerts day-to-day control over the actions of federal prison officials to prevent constitutional violations. Hence litigation plays a critical role in establishing a credible deterrent to such conduct. *Cf. District of Columbia* v. *Carter*, 409 U.S. 418, 427 (1973).

The *Hoosier* Court was speaking, in the passage set out above, only to the relative unimportance of uniformity in the context of matters outside the framework of collective bargaining; *i.e.*, the formation of the contract and private settlement of disputes.[25] Its reasoning hardly applies to the survival of constitutionally based damages actions, the objectives of which are not "the smooth functioning of . . . consensual processes" but rather the compensation of victims of official brutality, and the deterrence of those clothed with the power of the federal government from violations of constitutionally protected rights.

Petitioners' attempt to create an analogy with cases applying state statutes of limitations to federal causes of action fails because it tries to make too much of superficial similarities. Statutes of limitations cases form a distinct body of law, primarily because the impact of applying state limitations is ordinarily confined to the litigation and does not affect the federal interests in compensation for, and deterrence of, unconstitutional conduct. Moreover, in most cases, preservation of a cause

[25] Issues concerning the formation of the bargaining agreement and enforcement of arbitration clauses—which involve the lifeblood of § 301—are governed by federal law. *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *cf. Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962).

of action by timely filing is wholly in control of the wronged party (or the legal representative of the wronged party).[26] Application of state survival law, as exemplified by the instant case, may destroy a cause of action for reasons totally beyond the victim's control.

Petitioners also argue that, since laws of survivorship involve "traditionally local matters" such as inheritance laws and domestic relations, the case for a uniform law of survival is even weaker than the case of statutes of limitations. But this was precisely the thesis rejected in *United States* v. *Little Lake Misere Land Co.*, *supra*, where the Court held that the impact on a federal regulatory program required the creation of interstitial federal common law even though property law was traditionally found in the statutes and decisions of the states. 412 U.S. at 584-85.

It is also insignificant that wrongful death and survival laws, like statutes of limitations, are "inherently statutory in nature." Petitioners argue that "in the absence of common law analogues, the courts are less able to fashion such rules." Pet. Br. at 45. But the Court has done precisely this in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), where it abandoned reliance on state wrongful death statutes in admiralty law. A full and complete answer to petitioners' contention is found in the following statement by the unanimous Court in *Moragne*:

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no

[26] Thus, for example, the only reason the choice-of-law issue arose in *International Union* v. *Hoosier Cardinal Corp.*, *supra*, is that the plaintiffs tried for years to litigate their claim in the Indiana state courts. "Almost four years after the dismissal of that lawsuit by the Indiana trial court, and almost seven years after the employees had left the company, the union filed the present action in the United States District Court for the Southern District of Indiana." 383 U.S. at 699.

> present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

398 U.S. at 390.

It is true that this Court's opinion in *Robertson* v. *Wegmann*, *supra*, interpreting § 1988, and the approach to the Rules of Decision Act outlined in *United States* v. *Little Lake Misere Land Co.*, *supra*, permit the determination whether state law "supplements and fulfills federal policy"[27] to be made on a case-by-case basis. It is also true that this Court in *Robertson* rejected an argument that the need for uniformity compelled rejection of state law in that case. The majority there was careful, however, to "intimate no view . . . about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." 436 U.S. at 594.

We respectfully submit that the answer to that reserved question is undoubtedly a negative one (*see* pp. 32-35 *infra*). Thus, there is no point in requiring federal trial courts to look to state survival statutes only to supersede them with federal common law in the event that they would abate a suit where the unconstitutional action claimed the victim's life.[28] The Court should announce

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[27] *International Union* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 709 (White, J., dissenting).

[28] This Court has created federal common law in a variety of circumstances to effectuate the purposes of the civil rights acts

a uniform rule of survival in such cases, just as in *Moragne* v. *States Marine Lines*, *supra*, 398 U.S. at 409, it overruled *The Harrisburg*, 119 U.S. 199 (1886) and created a uniform federal maritime wrongful death action instead of merely overruling *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959) to permit federal courts on a case-by-case basis to disregard state law limitations on maritime claims. *See also*, *Sea-Land Services* v. *Gaudet*, *supra*.

B. In the circumstances of this case, the Indiana law of survival is inconsistent with the purposes of the federal cause of action and was properly rejected by the court below in favor of federal common law.

1. Indiana's wrongful death statute does not apply to this lawsuit.

We have argued above that the Court of Appeals correctly declined to approve the district court's action recasting respondent's Complaint as a "wrongful death"

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without reference to state law. In *Carey* v. *Piphus*, 435 U.S. 247, 257-59 (1978), the Court rejected the notion that denials of procedural due process were not compensable. The Court recognized the fact that in some cases, the interests protected by a particular constitutional right may not be protected by an analogous branch of the common law of torts (without any discussion of the specific law of the forum state). Adapting common law rules to provide fair recompense for constitutional violations is a delicate task, but as the Court said:

> The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.

435 U.S. at 258. In fashioning federal common law to arrive at an appropriate damages remedy, the Court carefully analyzed the federal interests involved. Such an approach is surely warranted where the issue is not the form of compensation but whether the federal cause of action survives at all. *See also*, *Imbler* v. *Pachtman*, 424 U.S. 409, 417-19 (1976); *Pierson* v. *Ray*, 386 U.S. 547, 554-55 (1967).

suit. *See* pp. 16-17 *supra*. Petitioners did not seek review of that holding. Even if the question were properly here, petitioners' arguments in support of the applicability of Indiana's "wrongful death" statute are unpersuasive under either § 1988 or the Rules of Decision Act.

Petitioners would have trial courts adopt any state survival or wrongful death statute involving a tort which happens to be on the books of the forum state. Their expansive reference to "analogous" statutes, which provides the springboard for their argument that the limitations on damages recoverable under Indiana's wrongful death statute do not "utterly" defeat the underlying purposes of constitutionally based damages actions, is ill-conceived and is not supported by this Court's decisions interpreting § 1988 or the Rules of Decision Act.[29]

Robertson v. *Wegmann*, *supra*, for example, suggests the contrary. The Court there found it unnecessary to resolve whether the reference to "the common law" in § 1988 might mean federal common law, as opposed to decisional law of the forum state, explaining:

> It makes no difference for our purposes which interpretation is the correct one, because Louisiana has a survivorship statute that, under the terms of § 1988, plainly governs this case.

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[29] With respect to one issue: statutes of limitations (an area in which the federal interest has traditionally been viewed as very attenuated, *see* pp. 24-27 *supra*), courts do seek to determine what state-created limitations period would be applied to an "analogous" cause of action under state law. *Beard* v. *Robinson*, 563 F.2d 331, 334-35 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978), and cases cited. There is often considerable difficulty in deciding which provision of state law covers "analogous" actions, *see id.* at 335-38; *Runyon* v. *McCrary*, 427 U.S. 160, 179-82 (1976). When no clearly applicable provision can be identified, "catch-all" limitations periods are adopted. *Beard* v. *Robinson*, *supra*, 563 F.2d at 338; *Crosswhite* v. *Brown*, 424 F.2d 495 (10th Cir. 1970); *cf. Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969). No similar course is available in the survivorship area.

436 U.S. at 589 n.5. The necessary implication is that, absent a survivorship statute *which plainly governs the case*, even under § 1988 a federal common law of survival must be created if abatement of a cause of action would be inconsistent with federal policy concerns.[30] Similarly, in *Jones* v. *Hildebrant*, *supra*, this Court said that application of a state statute "would appear to make sense only where the § 1983 damages claim is based upon the same injuries" which would give rise to the state cause of action. 432 U.S. at 187.

In Rules of Decision Act cases where there is no clearly controlling state statute which can be applied, the decision whether to "borrow" some analogous provision of state law also is not automatic, but depends upon consistency with federal purposes. *See United States* v. *Little Lake Misere Land Co.*, *supra*, 412 U.S. at 604;[31] *cf. Klimas* v. *International Tel. & Tel. Corp.*, 297 F. Supp. 937 (D.R.I. 1969) (district court in diversity action not bound by state Supreme Court holding which federal judge believes state court would overrule as soon as opportunity arises) (*dictum*).

There simply is no justification for applying Indiana's wrongful death legislation to this case.

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[30] This is precisely the methodology followed by the Court of Appeals in this case. There being no Indiana statute on point, the court turned to federal common law. *See* Theis, *Shaw* v. *Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681, 684-85 (1976). The petitioners have neither argued that § 1988 refers to state decisional law nor suggested that there is any Indiana decisional law that would support their position.

[31] "Once it is clear that Act 315 has no application here, we need not choose between 'borrowing' some residual state rule of interpretation or formulating an independent federal 'common law' rule; neither rule is the law of Louisiana yet either rule resolves this dispute in the government's favor."

2. *Indiana's survival statute is also inapplicable to this lawsuit.*

The Court of Appeals viewed Indiana's survival statute, Ind. Code Ann. § 34-1-1-1, as inapplicable to this suit, because it made no provision whatever for survival of a cause of action for injuries which proved fatal. *See* pp. 6, 13-14 *supra*. The petitioners have not contested this ruling, and we assume that it is the established law of this case. The choice-of-law question presented, therefore, is *whether in the absence of any applicable state legislation*, the Court of Appeals was correct in creating federal common law to permit survival of this constitutionally based damage action.

3. *Allowing this action to abate because the forum state's law failed to provide for its survival would be flagrantly unjust and contrary to the goals of compensation and deterrence which are served by creation of the action.*

Under Indiana law, no provision is made for the survival of a cause of action to recover damages for injuries from which an individual dies. Can this "forum state law" be applied to a constitutional damages action? Petitioners state in their brief that "convenience and jurisprudential limitations" favor adoption of state survival rules as the "desirable approach," a conclusion which they say is "strongly supported, if not compelled by the Rules of Decision Act." Pet. Br. at 45. The Court of Appeals made a contrary determination, based upon its understanding of the principles enunciated by this Court in *Robertson* v. *Wegmann*, *supra*, construing 42 U.S.C. § 1988. Whichever analysis—§ 1988 or the Rules of Decision Act—is utilized,[32] the result reached by the Court

[32] *See* note 20 *supra*.

of Appeals[33] must be affirmed. Permitting a direct constitutional action to abate when the victim of official brutality or gross neglect dies from his injuries defeats the purposes served by such an action. This requires the creation of a federal common law of survival.

In *Robertson* v. *Wegmann*, the Court found that the policies underlying § 1983 include both compensation of persons wronged by a deprivation of federally protected rights and "prevention of abuses of power by those acting under color of . . . law." 436 U.S. at 591. These policies are equally central to a *Bivens*-type action, and it virtually goes without saying that extinguishment with his death of any constitutional claims which a decedent may have had frustrates these interests. Even if the policy of compensating the wronged person would not be completely thwarted, because his estate could recover pecuniary losses in a state-created cause of action, the goal of curbing abuse of power by officials would be severely impeded.[34]

[33] The Court of Appeals determined that Indiana survival law should not be applied here because it would result in complete abatement of Joseph Jones' cause of action, a determination which we support in this section. On the assumption that Indiana's "wrongful death" statute should have been adopted, a contention we have already shown to be inconsistent with this Court's prior rulings, we respond in the following section to the petitioners' assertion that the statute's damages limitation is acceptable as applied to this *Bivens*-type action.

[34] In a footnote, petitioners represent that this Court ruled in *Carey* v. *Piphus*, *supra*, that compensation was the basic purpose of constitutional damage actions, and that deterrence is "inherent in the award of compensatory damages." Pet. Br. at 50 n.48. The implication is that through recovery of such damages as are allowed in an Indiana wrongful death action, the deterrent purposes of federal law can be satisfied. But the opinion in *Carey* expressly states, although finding no basis for an award on the record before the Court: "This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights." 435 U.S. at 257 n.11. The Court concluded by holding out the possibility that attorneys' fees might

The crucial distinction between Robertson [35] and this case is that, in the former, Louisiana law permitted the type of action maintained by Shaw's executor to survive, generally. It abated only because Shaw was not outlived by any of the statutorily designated kin. Thus, the Court held that abatement of the cause of action in that instance was truly due to circumstances unique to Shaw. But the Court stated that "[a] different situation might well be presented . . . if state law did not provide for survival of any tort actions . . . or if it significantly restricted the types of actions that survive." 436 U.S. at 594. That is precisely the situation here. Indiana law fails to provide for the survival of a cause of action for an entire class of victims of tortious—including unconstitutional—conduct: those who die of their injuries. By restricting survivorship rights in this manner, Indiana's statute is an "unreasonable" one. *Robertson* v. *Wegmann, supra,* 436 U.S. at 592.

There is no escaping the conclusion, which the Court of Appeals reached in this case, that it would subvert the policy of allowing complete vindication of constitu-

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also be available to provide "additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." *Id.*

[35] In *Robertson* the question was whether Clay Shaw's § 1983 damage suit against New Orleans District Attorney Jim Garrison for the latter's allegedly bad faith prosecution of Shaw for the Kennedy assassination should abate following Shaw's death from unrelated causes. Under Louisiana's survival statutes, the action would abate because Shaw left no widow, parent, or dependent kin. The Fifth Circuit ruled that Shaw's executor could continue the suit because Louisiana law was "inconsistent with the Constitution and laws of the United States" under § 1988 insofar as it would cause the suit to abate. Reversing, this Court held that, where the decedent died from causes having no connection with the alleged constitutional violations, it did not defeat the compensatory and deterrent purposes of § 1983 to apply Louisiana's survival statute even though in the particular circumstances of that case, doing so would cause the action to abate.

tional rights to sanction a rule that would permit Jones to obtain redress for violations of his rights if he lived, but foreclose recovery by the fortuitous circumstance of his consequent death. Petitioners suggest that, "except perhaps for the hypothetical case of a federal official who, in depriving a person of his constitutional rights, kills rather than maims because of a peculiar local survival statute, state laws of survivorship simply do not affect or regulate primary daily activity." (Pet. Br. at 44.) But it is not farfetched to assume that the "primary daily activities" of administrators or officers of a federal prison in a state like Indiana will be affected by knowledge that they are not individually responsible in substantial damages for the death of prisoners resulting from their unconstitutional actions or omissions. *See Robertson* v. *Wegmann, supra,* 436 U.S. at 600 (Blackmun, J., dissenting); *Jones* v. *Hildebrant, supra,* 432 U.S. at 190-91 (White, J., dissenting). It does not require a vivid imagination to envisage that, if the decision below is reversed, federal prison officials will feel little compulsion to correct the alleged horrible conditions at the Terre Haute prison hospital which caused Jones' death. Deterrence depends upon individual responsibility, and upon the knowledge on the part of officials within the federal prison bureaucracy, the hospital accrediting agency, and the health care profession who are entrusted with prisoners' lives, that they will be held accountable in money damages for their actionable conduct. *See Estelle* v. *Gamble, supra.*[36]

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[36] This would be true even if, as the government claims, an action against the United States lies under the Federal Tort Claims Act. Damages paid by the U.S. Treasury, rather than by the individual, are a much less effective incentive for the responsible officials to take corrective action.

4. *If the district court was correct in applying the Indiana "wrongful death" statute, it nevertheless erred in adopting the limitation on recoverable damages of that provision.*

Should the Court conclude, contrary to the views expressed above, that the trial judge acted properly in viewing Mrs. Green's complaint as the equivalent of a suit brought under Indiana's "wrongful death" statute, Ind. Code Ann. § 34-1-1-2, we believe that the judgment below must still be sustained. The limitation on recoverable damages which is contained in that law cannot be applied to a constitutional damage action consistently with the underlying purposes of the suit, just as the state's survival statute cannot be applied so as to result in abatement.

In *Jones* v. *Hildebrant, supra*, the Colorado Supreme Court (two Justices dissenting) held that a federal cause of action under § 1983 merged with the state action for wrongful death. One consequence of this view was that Colorado's limitation of damages for wrongful death to "net pecuniary loss" was deemed to be appropriate in the case of a violation of the decedent's federal constitutional rights. This conclusion stemmed from the Colorado court's fundamentally erroneous view that a § 1983 action was identical to a cause of action under the state's wrongful death act.[37] Whatever the reasonableness of a "net pecuniary loss" rule in promoting adjustment of the burden of loss caused by negligence and other tortious conduct, such a limitation does not further the protection of federal constitutional interests.[38]

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[37] *See Brief for the Lawyers' Committee for Civil Rights et al. as Amici Curiae, Jones* v. *Hildebrant, supra*, at 20-31.

[38] In *Sea-Land Services* v. *Gaudet, supra*, this Court held that the "net pecuniary loss" rule is an unacceptable measure of damages in *Moragne*-type wrongful-death cases. If such restrictions on the complete-justice principle are inappropriate in admiralty, *a fortiori* they are unacceptable here. *See* Page, *State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism*, 43 DEN. L.J. 480, 489 (1966).

In effect, the district court in this case "merged" the state wrongful death act into the *Bivens* action in accordance with its view that a constitutional action could not proceed without the state's wrongful death mechanism, and then applied the state law's limitation on damages without evaluating the impact on federal interests.

Petitioners stress the fact that the wrongful death act permits a substantial recovery unless the decedent leaves no widow, dependent child, or dependent next of kin. But the issue is not, as the petitioners contend, whether Indiana law "reduces the windfall relief available to non-dependent, non-spousal relatives." Pet. Br. at 49. Where deterrence of unlawful conduct is a paramount concern, as in this *Bivens*-type action, and that conduct causes the victim's death, the ultimate disposition of a damage award is of no moment. The goal is to avoid future death resulting from abuse of authority. Limiting the amount of recoverable damages impedes accomplishment of this goal (1) by making it uneconomical for anyone but spouses and dependent relatives to bring suit, and (2) by eliminating any expectation on the part of public officials that they will have to respond in a meaningful way for their unlawful conduct.[39]

The connection between the unconstitutional conduct and the victim's death serves to distinguish this case from *Robertson*, where there was no causal relationship between Shaw's death and the defendant's conduct. Death

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[39] The petitioners may be correct that the untrained nurse did not inject Jones with the wrong drug because of his awareness of the intricacies of Indiana survivorship law. But the knowledge that a person in such a position will be held responsible in damages for his conduct will most assuredly serve the policy of deterrence which underlies civil rights actions and lawsuits based on the violation of federal constitutional rights.

which *results* from unconstitutional conduct is a part of the constitutional violation. The federal interest in assuring adequate redress for what is essentially "capital punishment" in violation of the Constitution is greater than the interest that *a particular action* survive the death of the victim from natural causes.

In the *Robertson* context, it was perhaps explicable to say that "surely few persons are not survived by one of these close relatives. . . ." 436 U.S. at 591-92. But where the object is to prevent future "executions" without due process of law by those wielding the power of life and death, this is not an acceptable supposition. Ultimately, at least in Indiana, the rule urged by the government cheapens the lives of the many federal prisoners who, like Jones, are young, black, unmarried, and childless.[40]

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[40] As pointed out by the district judge in his order dismissing the respondent's Complaint (Pet. App. at 27a), her Petition for Letters of Administration filed (before this suit was instituted) in her son's estate in the Probate Division of the Circuit Court of Cook County discloses that his estate consists of a potential state cause of action worth $500. It does not appear who filled this amount in, but it would probably be an accurate assessment of the pecuniary value of an action under Indiana's wrongful death act.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed or, in the alternative, the writ of *certiorari* should be dismissed as improvidently granted.

Respectfully submitted,

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